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CONGRESSIONAL INVESTIGATIONS

A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt

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A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt

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To

MY MOTHER AND FATHER

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PREFACE

THE recent experiences of the United States Senate in attempting to compel the testimony of witnesses and punish them for contempt in the course of its investigations, and the procedure of its committees in making these investigations have caused many questions to be asked concerning the inquisitorial power of Congress.

What constitutional and legal rights does Congress have to the exercise of inquisitorial power, that is, the power of investigation and its three ancillary powers, namely: the power to compel the attendance and testimony of witnesses; the power to compel the production of papers and information; and the power to punish for contempt? Is there any express basis in the Constitution for the exercise of these powers? If not, what is their origin and under what interpretation of the Constitution may such powers be implied? Inasmuch as these powers are judicial in character, is it not contrary to the doctrine of the separation of powers for Congress to exercise them except where it has received a judicial grant in the Constitution? Assuming that Congress has these powers, is it not restricted in their exercise by the amendments to the Constitution guaranteeing personal rights? If so, to what extent? What is the difference between the powers of the House of Representatives and the powers of the Senate in this respect? What is the difference between the powers of either House of Congress in this regard and the power of Congress to enact legislation providing for the exercise of such powers? Can either House delegate the power to punish for contempt to

its committees? Can Congress by an act delegate such power to investigating committees or commissions? What methods has Congress used in compelling testimony and punishing for contempt? Why have congressional investigations been necessary? Finally, can the courts review the inquisitorial powers of Congress or are the Houses of Congress the final adjudicators of their powers in this respect?

It is the major purpose of this study to analyze the problems indicated by these questions. To do so, it has been necessary first to get a clear understanding of the roots from which the exercise of inquisitorial power by Congress has grown, hence the first chapter deals with early English, colonial and state precedents. Then an analysis is made of the development of congressional precedent and practice. In considering the development of inquisitorial power by Congress only the more important cases of investigation and punishment for contempt are studied, namely, those which portray step by step how this power was established. The debates in these cases have been analyzed in some detail in order to explain the reasons for the frequent exercise of this power and its significance in our federal governmental machine. Much material has also been gleaned from the reports of investigating committees.

A review of the cases of congressional investigation shows that they fall into three main classes: (1) investigations pertaining to the expressly enumerated or implied privileges of Congress (2) investigations into the administration of the law (3) investigations for the purpose of securing information to aid in the making of legislation.

In studying the question of the power of Congress to punish for contempt, which is the basis for its use of compulsion in investigative proceedings, a distinction should be noted between its power to punish contumacious witnesses in the course of its inquiries and its power to punish for

contempts involving breaches of its privileges such as assault on members, bribery and libel. This study is concerned primarily with the former power, but it is impossible to consider the problem solely from this viewpoint since Congress has used this power indiscriminately to apply to both classes of cases. It has been necessary, therefore, to refer to some of the cases relating to the power of Congress to punish for contempt for breaches of privileges, as much of the debate and proceedings in these cases is relevant to this study.

In analyzing the power of Congress to punish contumacious witnesses for contempt the following classes of cases have been considered: (1) where witnesses are contumacious before (a) standing committees of the Houses of Congress (b) special committees (c) joint committees (d) the Houses themselves (e) commissions appointed by Congress under special acts; (2) the character of the proceedings in contempt is studied with respect to contumacious witnesses and also in those cases where the contempt consists of a direct interference with the functioning of Congress, such as cases of libel, bribery and assault; (3) the various methods used by Congress in punishing for contempt have been considered, namely; (a) by a House of Congress directly (b) by a court in accordance with a statute, as a contempt of a House of Congress (c) by a court as a contempt of court.

While these are the main problems considered in this discussion, some attention has also been given to the necessity for these investigations and their place in our governmental machine.

I wish to acknowledge the generous aid and criticism of Professors Howard Lee McBain and Thomas I. Parkinson. I am also indebted to Bell S. Root for help in verification of data, and finally, to my wife, for her valuable assistance during the preparation of this study.

E. J E.

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CHAPTER I

The Origin and Development of Inquisitorial Power to 1789

It is generally understood that a legislative body may make inquiries for the purpose of acquiring information necessary to the enactment of law, or for the purpose of learning if laws are properly executed.[1] However mere "naked inquiries" could hardly ever be effective without the power of punishing as contempt the refusal to answer them.[2] The power of investigation through a committee is essential to wise legislation. The power to call for information from others flows from this necessity. Hence the old formula of authority to send for persons and papers.

But to rob the process of such a committee of all compulsory effect, to reduce it to a request, to deny all means of enforcement and all power to punish for disobedience, would be to render inquiry often fruitless, to exclude sources of information, and to impair or defeat the objects of legislation.[3]

The possession of this power by American legislatures, while necessary, seems at once to be diametrically opposed to the theory of the separation of the powers of government, for it is plainly an exercise of judicial power and has been held as such by the court in innumerable cases.[4] As Wigmore says:

[1] Luce, Robert, *Legislative Procedure* (Boston, 1922), p. 170.

[2] Whitridge, F. W., "Legislative Inquests," *Pol. Sci. Quart.*, vol. i, p 84 (1886).

[3] Wickelhausen *v.* Willett, 10 Abb. Prac. (N. Y.) 164 (173) (1860).

[4] Kilbourn *v.* Thompson, 103 U. S. 168 (1880). (See list of cases cited in this decision.)

The duty to give testimony is a duty to the state, but the function of enforcing the duty resides specifically in the judicial branch of the government. The constitutional question thus arises, on the one hand, whether the power of enforcement can for any purpose be exercised by the legislative branch, in the course of investigations which it may choose to make, either as preliminary to its decision upon legislation or as ancillary to the enforcement of its own internal order.[1]

The theory of the tripartite division of the powers of government maintains that the legislative, executive and judicial departments are distinct and exclusive. No one of the three can ever exercise any of the powers of the others. The power to judge of contempts and to punish for them being a judicial power, a legislature can in no case exercise it, except where it is expressly conferred.

There is, however, no such clear-cut division between the powers of government. Both the executive and legislative departments have always exercised certain judicial powers ancillary to their own. In nearly all of the American colonies the upper house of the legislature acted as a court. In New York State, the Senate, with some of the judges and the Chancellor, acted as a court of last resort until 1846. In most of the states of the Union, the upper house of the legislature still remains part of the court for the trial of impeachments. Every legislature in the Union is conceded to have the power to judge of the election of its own members. So it is quite patent that legislatures have judicial power, in fact, must have it in order to function efficiently.[2]

The power of a legislature to send for persons and papers is much older than our Federal Constitution. Before James-

[1] Wigmore, J. H., *On Evidence* (Boston, 1923), 2nd ed., vol. iv, sec. 2195.

[2] See Montesquieu, *Spirit of Laws* (Cincinnati, 1873), bk. xi, ch. vi, pp. 181, 182.

town or Plymouth, yes, before the separation of Lords and Commons, the High Court of Parliament exercised this privilege as to English subjects, often with rudeness and despotism.[1] In the states which had previously been colonies the constitutions adopted the common law of England, in so far as it formed part of the law of the colony in 1775 and this included the "Lex et Consuetudo Parliamenti" which forms part of the common law of England. The power of Parliament to institute inquiries, to order the attendance of witnesses, and, in the event of their refusal to attend or to testify, to punish them for contempt, has been repeatedly upheld by the English courts as part of this "Lex et Consuetudo Parliamenti."[2] For example, the court said in Howard v. Gossett, 10 Q.B. 359:

> The House has power to order the attendance of witnesses, and in case of disobedience, to bring them in custody to the bar for the purpose of examination. It has power in case of a charge of contempt and breach of privilege, and wilful disobedience of an order on the person charged to attend and answer it, to cause the person to be taken into custody and brought to the bar to answer the charge. The House alone is the proper judge when these powers are to be exercised.[3]

Again we find the courts in England saying: "The power of punishing contempts is inherent in every assembly possessing a supreme legislative authority, whether they are such as tend directly to bring their authority into contempt or indirectly to obstruct their proceedings."[4]

[1] McConachie, L. G., *Congressional Committees* (New York, 1898), pp. 78, 80.

[2] Burdette *v.* Abbott, 14 East 1 (Eng. 1811); Goffin *v.* Donnelly, 6 Q. B. D. 307 (Eng. 1881); Kielley *v.* Carson, 4 Moore P. C. 63 (89) (Eng. 1841-2); Rex *v.* Wright, 8 T. R. (D. & E.) 293 (Eng. 1799); *7 A. & E. Ann. Cas.* 877.

[3] See Earl of Halsbury, *Laws of England* (London, 1907-1917), vol. xxi, p. 781.

[4] Beaumont *v.* Barrett, 1 Moore P. C. 59 (Eng. 1836).

The list of parliamentary commissions shows the exercise of inquisitorial power over the widest range of subjects.[1]

Lord Campbell quotes the following opinion of Chief Justice Wilmot, applying equally to the Houses of Parliament:

> The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution. It is a necessary incident to every court of justice whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court, stands on the same immemorial usage which supports the whole fabric of the common law. It is as much the "lex terrae" and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find any vestiges for its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posteriority to be found about it. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society.[2]

Thus it is quite clear that Parliament had the unquestioned power to order testimony and punish for contempts. Moreover, the courts have often held in England that each House of Parliament is the exclusive judge of contempts of its own authority.[3]

[1] Graham, Harry, *Mother of Parliaments* (Boston, 1911), pp. 176, 177 *et seq.* Also see Potts, "Power of Legislative Bodies to Punish for Contempt," 74 *U. Pa. L. Review*, p. 691 (1926).

[2] Campbell, John, *Lives of the Chief Justices of England* (Philadelphia, 1851), vol. iii, p. 90. See also 1 Blackstone, *Commentaries on the Laws of England* (Philadelphia, 1898), p. 163 *et seq.*

[3] See cases collected in argument in Burdett *v.* Abbott, 14 East 1; see 8 *American Law Journal*, pp. 111-139; Rapalje, Stewart, *Treatise on Contempt* (New York, 1894), sec. ii, p. 3.

The elements and principles of parliamentary law were brought into the colonies, and became attributes of the power and constitution of assemblies, wherever they were formed upon the model of Parliament. Much of our colonial history is filled with instances of the assertion by the colonial legislatures of the possession by them of all the rights of Parliament.

In Virginia, in 1718, the Assembly concluded itself entitled to all the rights and privileges of an "English Parliament" and the records were searched for precedents.[1]

Lord Cornbury in his report of 1704 on the state of affairs in New York colony said:

> You will perceive that the assembly here is going into the same methods that the assemblies of some other provinces upon this continent have fallen into, who think themselves entitled to all the powers and privileges that the House of Commons in England enjoys. How dangerous it may be to suffer them to enjoy and exercise such powers I need not tell your Lordships.[2]

In Rhode Island's early history investigating committees traveled from town to town.[3] The journals of the colonial assembly of New York abound with instances of the assertion of the general parliamentary rights and privileges, and especially of punishing contempts of its dignity or authority; moreover, there are many examples in the colonial history of New York of the use of investigating committees.[4]

[1] Bancroft, George, *History of the U. S.* (New York, 1885), vol. iii, p. 27.

[2] *Documents Relating to the History of New York*, ed. by E. B. O'Callaghan (Albany, 1850), vol. iv, p. 1121.

[3] McConachie, L. G., *op. cit.*, pp. 78, 80.

[4] See 6 *Documentary History of New York*, arranged by E. B. O'Callaghan (Albany, 1850), p. 695; 4 *Documents Relating to the Colonial History of New York*, by Brodhead, John Romeyn, ed. by E. B. O'Callaghan (Albany, 1856-61), pp. 1121, 821, 418; also, *Journal of the Votes and Proceedings of the General Assembly of the Colony of New York*, vols. i and ii, 1691-1765 (New York, 1764, 1766); vol. iii, 1767-1775 (Albany, 1820), *passim*.

At the beginning of every session a committee on privileges and elections was appointed and authorized to send for persons, papers and records.[1] Special committees were armed with the same power. In the Journals we find the following:

The petition of several freemen and freeholders of Montgomery Ward in the city of New York setting forth, That the petitioners are informed and have great reason to suspect, that one George Paterson is about repairing an old house in the said ward, in order for refining of sugars, which they conceive if done, will greatly endanger the buildings and the health of the inhabitants thereabouts, by fires and noisesome smells, which are generally incident to such places, and therefore humbly praying the honourable house to take such measures for preventing the aforesaid inconveniences, as to them shall seem meet.

Ordered,

That the said petition be referred to the consideration of a committee, and that they do examine the matter thereof, and report the same, as it shall appear to them to the house.

Ordered,

That the members of New York and Westchester, or any five of them, be the said committee, and that they have power to send for persons, papers and records.[2]

Later the following instance occurred "Ordered, That a committee be appointed to examine the accounts of Messrs. Cornelius Van Home and Paul Richards, Commissioners for purchasing provisions for the forces raised in this colony on the late intended expedition against Canada, That they have power to send for persons, papers and records, and that they report their proceedings thereon to the House." [3]

[1] *Journals, op. cit., passim.*

[2] 2 *Journals, op. cit.*, p. 120.

[3] 2 *Ibid.*, p. 225.

On the 15th of April, 1691, the following warrant was issued by the Colonial Assembly of New York:

Whereas, certain information is brought to the House, that John Tradwell, returned by Queen's County, to serve as a member of this House, hath been arrested by one Thos. Clark, Under Sheriff of the city and county of New York, while he was attending the services of this House, contrary to the rights and privileges thereof. These are therefore to order and require you to bring Thos. Clark, Under Sheriff of the city and county of New York, forthwith to this House to answer the said contempt; and this shall be your warrant.[1]

During the same year, the New York Assembly having been informed that Mr. Dally (the French minister)

had received a petition signed by several inhabitants of Harlem and Westchester, he was called before the House and having refused to answer the questions put to him, was declared guilty of a contempt, and committed to the custody of the Sergeant at Arms and there to remain until he shall make answer, or be discharged by the House.[2]

George Webb was taken into custody for insulting, and R. Richards for assaulting, a member.[3]

In 1701 the upper house of the colonial legislature examined two persons who had been accused of obtaining a contract worth five hundred pounds from a corrupt official for the sum of seventy-two pounds, and upon their refusal to testify concerning the transaction, the Council committed them for contempt.[4] This was made the subject of complaint to the Lords of Trade, and Lord Bellamont, then Governor of the colony, reported upon it as follows:

[1] 1 *Journals, op. cit.*, p. 4.

[2] 1 *Ibid.*, pp. 9-10.

[3] 1 *Ibid.*, pp. 406, 419.

[4] 4 *Documents Relating to the Colonial History of New York*, pp. 418, 821.

Mr. Montague would make the commitment of Messrs. Burt and Wilson a great offence calling it arbitrary and illegal and is so disingenuous as to charge it on me singly, as my act, though he knows very well it was done during the session of the Assembly, and that the Council and I did it in our legislative capacity, wherein we had the concurrence of the House of Representatives, and if I may believe Col. Smith and Mr. Graham, who are our Chief Judge and Attorney General, the Governor and Council have during the session, in such cases, a judicial power like that of the House of Lords in England and can hear and determine civil causes (not appealable to the King) and imprison the parties offending. If the proceedings against Burt and Wilson were extrajudicial, why then, have we not an able judge and attorney general to set us right and keep us to the strict rules of the law? In this case we acted by the best advice we could have had, and it was done to discover a fraud put on the King in his revenue of excise.

In November, 1753 Hugh Gain was ordered to attend the House on account of a prohibited publication, and was brought up and reprimanded.[1] In October, 1756 Parker and Weyman were taken into custody by the Sergeant at Arms for publishing a paper reflecting on the House. Watkins, being discovered to be its author, was arrested by the Sergeant. It was resolved that he was "guilty of a high misdemeanor and a contempt of the authority of this House" and he was committed to the custody of the Sergeant. He apologised and was discharged on payment of fees.[2] A similar course was pursued with Samuel Townsend.[3]

In 1770-1771 we find the case of McDougall. He published a libel upon the House, was adjudged guilty of a misdemeanor, was arrested and brought to trial. His defense

[1] 2 *Journals, op. cit.*, p. 358.

[2] 2 *Ibid.*, p. 487.

[3] 2 *Ibid.*, p. 554.

was voted a contempt, and he was sent to jail. A writ of habeas corpus was sued out of the Supreme Court, and the return was a commitment, by virtue of a warrant of the Speaker, for a contempt of the authority of the House. This was in December, 1770 and he remained imprisoned until March 4, 1771 when the Assembly was prorogued.[1]

The precedents just cited illustrate the wide extension of the use of the inquisitorial power and the power to punish for contempt in colonial history, especially in the colony of New York. While theory and practice seem to make a convincing case for the position that the legislative power to punish for contempt, and issue compulsory process in investigations was inherited by the colonial legislatures from the parliamentary powers of like nature, there are many who deny such a legacy. Several cases decided by the British Privy Council take this attitude. In Kielly v. Carson *et al.*[2] Mr. Baron Parke speaking for the Privy Council said:

This power, i. e. (to punish for contempts) belongs to the House of Commons in England, and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription, the *Lex et Consuetudo Parliamenti,* which forms a part of the common law of the land. . . . They are a local legislature[3] with every power reasonably necessary for the proper exercise of their functions and duties, but they have not what they have erroneously sup-

[1] 3 *Documentary History of New York*, pp. 534, 537. (In general see 3 *Journals of the Colonial Assembly* from 1st of November, 1769 to 27th of January, 1770, p. 7).

[2] Kielley *v.* Carson *et al.*, 4 Moore P. C. 63 (89). See cases cited in this decision.

[3] The Legislature of New Foundland.

posed themselves to possess, the same exclusive privileges which the ancient law of England has annexed to the House of Parliament.

In other words it was held that a legislative body created by a commission from the crown, unless endowed with power to commit for contempt, could not do so, except for offences committed in its presence. Such a power was not a necessity for legislative capacity thus constituted.

A very famous case [1] in American legal history denies any analogy or connection between the power of Parliament to punish for contempt and that of Congress, basing its opinion on the decision in Kielley v. Carson. While this decision is not in point with the subject we are discussing, yet it is a fact that Congress laid claims to this power on the same grounds as did the colonial legislatures and later state legislatures, viz. an inheritance from Parliament.

Mr. Justice Learned of the New York Supreme Court said in a noted case, McDonald v. Keeler [2] (later reversed in 99 N. Y. 463):

But without going over the history of colonial authority it is enough to say that the counsel for the respondent has cited to us no grant from the English Parliament or from the crown, which conferred upon the colonial legislature the privileges of Parliament, and unless these privileges were expressly given, the power to legislate, as has been shown, carried with it no power to punish for contempt. We are brought to the belief that the exercise of that power, though submitted to by the sufferers and even though supported by the colonial courts, was in violation of the law of England, as above set forth.

On the other hand Judge Story said on this point:

Now by the common law, the power to punish for contempts

[1] Kilbourn *v.* Thompson, 103 U.S. 168 (fully analyzed, *infra*, pp. 350-355).

[2] People *ex rel.* McDonald *v.* Keeler, 32 Hun (N. Y.) 563 (577).

of this nature belongs incidentally to courts of justice and to each House of Parliament. No man ever doubted or denied its existence as to our colonial assemblies in general, whatever may have been thought as to particular exercises of it.[1]

Whitridge in his study of legislative inquests says: "It has been overlooked in these cases [2] that there was never any such claim, or any such exercise of the rights and privileges of Parliament as was made or exercised in the thirteen American Colonies which became the American Union.[3]

At any rate, whatever may have been the rule, when an assembly acts upon a commission from the crown, recognized as the only source of its creation and power, it seems certain that the Assemblies of the Colonies placed their authority and its extent on a very different footing. That the people had a right to be represented in an assembly and did not enjoy this right through the grace of the crown merely, was a fundamental doctrine. For example the remarkable Charter of Liberty drawn up by the inhabitants of New York in 1683 embodied this principle.[4] It was repeated in the important act of 1691, declaring the rights and privileges of their majesties' subjects within the province of New York.[5] It is found in the address of the assembly of 1704,[6] and in the resolves of 1711,[7] declaring the right of the people to

[1] Story, Joseph, *On the Constitution* (Boston, 1833), p. 614.

[2] Kielley *v.* Carson, *et al.*, 4 Moore P. C. 63.

[3] Whitridge, F. W., *op. cit.*, p. 90.

[4] See 1 *Colonial Laws of New York* (Albany, 1894), p. 111. (This so-called "Charter of Liberties and Privileges granted by His Royal Highness to the inhabitants of New York and its dependencies" was really an act of the Colonial Legislature. The act was passed Oct. 30, 1683 and vetoed by the King, March 3, 1684. See also 2 *Rev. Laws* (N. Y., 1813), note on p. 6 of Appendix.

[5] 1 *Colonial Laws of New York*, p. 244.

[6] 1 *Journals, op. cit.*, p. 244.

[7] 1 *Ibid.*, p. 286.

dispose of the money of the freemen of the colony, which does not proceed from any commission, but from the free choice and election of the people, and is constantly asserted throughout the struggles between the governors and assemblies in our colonial days.

The usage, custom and practice of the realm of England, "the laws of England," were perpetually recognized as the rules of the assembly and the law of the colony. Thus claiming, in matters of legislation, powers coequal in most particulars with those of an English Parliament, the Assemblies claimed a right to the possession of the authority vested in that Parliament, for carrying out the great objects of legislation. They adopted and acted upon the doctrine that the law of Parliament was part of the inheritance of Englishmen, brought with them to the colonies, and as fully in force as the common law which accompanied their migration.[1]

The powers thus asserted and exercised by these colonial legislatures, fell, by a natural descent, upon the various legislatures of the states which succeeded them. There is a presumption of the existence, in the separate legislatures, of this inherited authority and right, and express constitutional provision should be found to void or impair it.

Of the eleven states adopting constitutions during the Revolution, nine made no reference to the power to punish for contempt. However it was evidently implied from certain provisions contained in them. For example, the New York State Constitution of 1788, art. 9, provided that "The Assembly, thus constituted, shall choose their own Speaker, be judges of their own members, and enjoy the same privileges, and proceed in doing business in like manner, *as the Assemblies of the Colony of New York of right formerly did.*"

[1] McConachie, L. G., *op. cit.*, p. 31.

On the other hand, the amended Constitution of 1821, art. 1, sec. 3, merely provided that "each house shall determine the rules of its own proceedings, and be the judge of the qualifications of its own members", leaving out the words in italics (stated above) in the former Constitution. This omission was commented upon by the revisers of 1829 who believed that "it was not intended to deprive, and cannot have the effect of depriving the two houses of the legislature of the indispensable power of punishing contempts".[1]

Not until the revision of 1829 was any attempt made in New York State thoroughly and systematically to define the privileges and proceedings of the legislature. It is also true that up to this time neither the Constitution of the state nor any statute attempted to define contempts which are the subject of punishment.

A study of the roots of the present legislative law in New York State relating to this subject shows that an act of the legislature passed in 1778, which was copied from the British statutes,[2] evidently implied that there were at common law certain privileges of the legislature and its members.[3] This act marked the first attempt to define by statute the subject of the privileges of the legislature or of either house and the course of legislative proceedings. It was carried into the Kent and Radcliff revision of 1801 [4] and appeared again in the Van Ness and Woodworth revision of 1813.[5] In both of these revisions the identical wording of the Act of 1788 was used. In December, 1828 the legislature repealed this act by a law passed for the purpose of clearing the way for a new revision.[6]

[1] 5 *N. Y. Statutes at Large*, Edmonds' ed. (Albany, 1863), pp. 259, 260.

[2] 12 & 13 Will., ch. iii, and 2 Geo. II, ch. xxiv.

[3] 2 Greenleaf (N. Y.) 59 & 60. (For statement of Act, see *infra*, Appendix A, p. 424.)

[4] 1 Kent & Radcliff (N. Y.) 133.

[5] 1 *Rev. Laws* 122 (Van Ness & Woodworth, N. Y.).

[6] *Laws of N. Y.*, 51st Sess., 2nd Meeting, 1828, ch. xxi, par. 3.

It must be admitted however that the whole matter in the early 19th century was obscure and indefinite so far as any constitutional or statutory prescription was concerned.

The revisors of 1829 in commenting on the indefiniteness of the subject and the need for statutory definition reported as follows in their notes:

> But as neither the Constitution of this state, nor any existing law has attempted to define the contempts which are the subject of punishment, the question recurs, whether it is not proper to provide a legislative definition of these privileges of the House, and their members, the breach of which is regarded as a contempt, so as to remove that uncertainty which has hitherto hung over the subject and often proved a snare to the unwary. The difficulty of defining the different modes in which contempts and breaches of privileges may be committed, ought not to deter us from making the attempt since no inconvenience of an imperfect enumeration and description of this class of offences and the punishment applicable to each, can be so great as to permit the law to rest silently in the breasts of those who are to apply it as cases arise, and that too, when they are themselves the injured parties.
>
> The concession already made, *that each branch of the legislature does possess the power of punishing contempts, does not diminish* the expediency of attempting to define the manner in which a power so vague and so general in its nature, and so liable to abuse, ought to be exercised.[1]

The revision of the statutes in 1829 brought together the scattered fragments of law existing prior to that time, and since 1830 the whole subject of the privileges of the legislature and the power to punish for contempt has been regulated by statute.[2]

The power of inquiry and its concomitant, the power to

[1] See 5 *N. Y. Statutes at Large*, Edmonds' ed., pp. 259, 60.

[2] *N. Y. State Consolidated Laws*, Legislative Law, see *infra*, App. A, pp. 424-431.

punish for contempt, have been frequently used by American state legislatures, not only directly, but indirectly, by means of commissions and special investigating bodies.[1] This power has been used indiscriminately by American legislatures, in connection with cases of libel, fraud, physical obstruction with their duties, or in making investigations for purely legislative purposes, such as to secure information necessary to enact legislation. Moreover, this power has been used by most of these legislatures, and especially in New York State, regardless of constitutional or statutory authority. It was simply considered as being an ancillary power properly belonging to every sovereign legislature, and was not affected by the theory of the division of powers of government. It has always existed in the United States as a sine-qua-non of the legislative function. It is true that it has been regulated and defined by statute and by some state constitutions, but these prescriptions have usually served only to strengthen the hand of the legislature.

One of the leading cases in New York State relating to this power has the following to say: "Throughout this Union the practice of legislative bodies, and, in this state, the statutes existing at the time the present Constitution was adopted, and whose validity has never before been questioned by our courts, afford strong arguments in favor of the recognition of the right of either house to compel the attendance of witnesses for legislative purposes, as one which has been generally conceded to be an appropriate adjunct to the power of legislation, and one which, to say the least, the State legislature has constitutional authority to regulate and enforce by statute." [2]

[1] Note: The writer counted 250 major legislative investigations in New York State between 1811-1923: See *N. Y. State Legislative Reference Library*, Albany, N. Y. *Librarian's Index*, "Investigations".

[2] People *ex rel.* McDonald *v.* Keeler, 99 N. Y. 463 (483-4) (1885); see

It is quite essential that a sovereign legislature have this power; careful investigation and correct analysis are the bases of good government.[1] The power to subpoena witnesses is a necessary incident to the sovereign power of making laws, and its exercise is often indispensable to the great end of enlightened, judicious and wholesome legislation.[2] Again referring to McDonald v. Keeler, the ruling case in New York State, we find the following statement on this point, " It is difficult to conceive any constitutional objection which can be raised to the provision authorizing legislative committees to take testimony and summon witnesses. In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation." A learned commentator on legislative bodies says of this power:

It would be inconsistent with the nature of such a body to deny it the power of protecting itself from injury or insult. If its deliberations are not perfectly free, its constituents are eventually injured. This power has never been denied in any country and is incidental to the nature of all legislative bodies. If it possesses such a power, in the case of an immediate insult or disturbance, preventing the exercise of its ordinary functions, it is impossible to deny it in other cases which, although less immediate or violent, partake of the same character by having a tendency to impair the firm and honest discharge of public duties.[3]

also Burnham *v.* Morrissey, 14 Gray (Mass.) 226 (1859); *In re* Falvey *v.* Massing, 7 Wis. 630 (1859); Lowe *v.* Summers, 69 Mo. App. 637 (649) (1897); *Ex Parte* Parker, 74 S. Car. 466 (1906); State *ex rel.* Rosenhein *v.* Frear, 138 Wis. 173 (1909); Sullivan *v.* Hill, 73 W. Va. 49 (53) (1913). In general see: 7 *A. & E. Ann. Cas.* 877.

[1] Lapp, J. A., " Legislative Investigations," in *Amer. Pol. Sci. Rev.*, vol. iv, pp. 68-73 (1910).

[2] Wilckens *v.* Willet, 4 Abb. App. Dec. 596 (1864).

[3] Rawle, W., *A View of the Constitution* (Philadelphia, 1829), 2nd ed., ch. iv, p. 48.

Kent, in commenting on the power of American legislatures to punish for contempt said:

It is a power inherent in all legislative assemblies and is essential to enable them to execute their great trusts with freedom and safety. And it has been frequently exercised, not only by Congress, but by the respective branches of the state legislatures and may be considered as indisputably acknowledged and settled.[1]

The general authority of the legislature in such cases is well stated by Cushing as follows:

It has always, at least practically, been considered to be the right of legislative assemblies to call upon and examine all persons within their jurisdiction, as witnesses, in regard to subjects, in reference to which they have power to act, and into which they have already instituted, or are about to institute, an investigation. Hence they are authorized to summon and compel the attendance of all persons within the limits of their constituency as witnesses and to bring with them papers and records, in the same manner, as is practiced by courts of law. When an assembly proceeds by means of a committee, in the investigation of any subject, the committee may be and usually is, authorized by the assembly to send for persons, papers and records.[2]

The foregoing discussion sanctions the following conclusions—

1. That the source of the legislative power in America to subpoena witnesses and punish for contempts (in other words, make these inquiries effective) is to be found in the heritage of law and governmental institutions bequeathed to us by England, supplemented by the necessity for the exercise of this power;

[1] Kent, James, 1 *Commentaries on American Law* (Boston, 1873), 12th ed., p. 236.

[2] Cushing, L. S., *Law and Practice of Legislative Assemblies* (Boston, 1907), 9th ed., sec. 634, p. 253.

2. That this power to punish for contempt was used indiscriminately to apply to cases of libel, fraud, physical violence on members, cases of refusals to attend the summons of committees or refusals to answer questions;

3. That this power was not affected by the early state constitutions, nor did the theory of the division of powers of government have any effect on its development. It was simply considered as the sine-qua-non of effective legislative performance.

CHAPTER II

The Influence of the Federal Constitution and Early Congressional Procedure to 1827

It is logical to make a distinction between the exercise of inquisitorial power by the national and state legislatures, since the Houses of Congress possess only such powers as are conferred upon them, while the state legislatures have all the legislative powers which are not withheld from them. Hence state legislatures may have power to punish for contempts and subpoena witnesses which, in the case of Congress, would be *ultra vires*. However it is true that this distinction loses much of its force when we consider the question as being whether there is an implied power to investigate which supports the exercise of whatever legislative power has been granted to the legislative body.

It is remarkable that no power is expressly conferred on Congress to punish for any contempts committed against either House, and yet it is clear that unless such a power to some extent exists by implication, it is utterly impossible for either House to perform its constitutional functions.[1] In the Convention a proposition was made and referred to the select committee appointed to draft the Constitution, giving authority to punish for contempts and enumerating them. The committee made no report on the subject.[2] It may be that this committee was influenced by the policy of Parliament in never choosing to define its privileges, lest after-

[1] Story, Joseph, *On the Constitution*, 5th ed., p. 613.

[2] 2 Farrand, Max, *Records of the Federal Convention of 1787* (New Haven, 1911), p. 340, 1. August 20.

wards a new case might arise that did not come within the rules, thus foreclosing their ground against the offender.[1]

Apparently the framers of the Constitution meant to give the people adequate protection against an excessive use of the inquisitorial power by Congress. For example the Constitution guarantees the right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures.[2] Certain clauses in the Fourth, Fifth and Sixth, also Ninth and Tenth Amendments to the Constitution may be so construed as to give the people protection against an unwarranted exercise of this power. Moreover the privileges of Congress were specifically stated as follows: (1) The House shall have the sole power of impeachment,[3] the Senate the sole power to try all impeachments,[4] (2) each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members in such manner, and under such penalties, as each House may provide,[5] (3) each House may determine the rules of its proceedings,

[1] 1 Blackstone, *Commentaries*, p. 164. "Privilege of Parliament was principally established in order to protect its members not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the crown. If, therefore, all the privileges of Parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and so determined, it were easy for the executive power to devise some new case, not within the line of privilege and under pretense thereof to harass any refractory member and violate the freedom of Parliament. The dignity and independence of the two Houses are therefore in great measure preserved by keeping their privilege indefinite."

[2] Federal Constitution, Fourth Amendment.

[3] *Ibid.*, Art. I, sec. 2.

[4] *Ibid.*, Art. I, sec. 3.

[5] *Ibid.*, Art. I, sec. 5.

punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member.[1]

In addition to these privileges, both Houses of Congress easily claimed the implied privilege of acting in cases where their existence was threatened, that is, cases of assault, libel or bribery of members. In such cases they could punish the act itself as a contempt or they could punish contumacy in witnesses in investigating such cases as a contempt. Such privileges have always been considered to inhere in the very nature of a sovereign legislative body and no express constitutional sanction would be necessary although the fact that both Houses were given the constitutional authority to determine the rules of their proceedings and expel members certainly furnishes some constitutional basis for the exercise of such power. In other words, these privileges were easily implied from those granted in the Constitution.

It would be difficult to conceive Congress not having the implied power of compulsory investigation, that is, the power to summon witnesses and punish for contempt in cases involving its express or implied privileges, as the exercise of such power might very easily be necessary to its existence.

However, it is difficult to see how the same point could be made with reference to its general powers of legislation, such as making the tariff, appropriating public funds or regulating interstate commerce and strong and bitter protests have been made in Congress against the exercise of such power.

However the fact is that, from the very day of its inception, Congress proceeded to adopt a wide view as to its inquisitorial power and by degrees built precedents establishing its authority to conduct compulsory investigations and to issue compulsory processes not only with respect to subjects pertaining to its expressly enumerated or implied privileges, but also with respect to the whole field of legislation author-

[1] *Idem.*

ized by the Constitution. In practically every case where an expansion of this implied power occurred, strong arguments were made in opposition, but usually to no avail.

It will be the purpose of the four chapters following to show how this power was established, including an analysis of the leading cases of proceedings illustrating development, the evolution of statutes relating to this power and decisions of the courts.

Very sparingly, to begin with, did the House delegate to its committees the right to send for persons and papers. This power appears long to have been deemed too serious a matter for general delegation and even in the case of Parliament, it became the custom to act by separate order in each case of need.[1] Witnesses were not to be produced save where the House had previously ordered an inquiry nor even then were orders for their attendance to be given in blank.

An examination of the earlier cases in Congress discloses the fact that the forms and methods observed in the English Parliament, both branches, were adopted and followed, preference being given to the practice of the House of Lords, in which witnesses were sworn and their evidence given under oath in open session, while in the House of Commons they were not sworn, except during the brief period of the Commonwealth.[2] This distinction between the two houses

[1] 2 Hatsell, John, *Precedents of Proceedings in the House of Commons* (Dublin, 1786), p. 102; 3 Grey, p. 51, quoted in *Barclay's Digest*, sec. 13, p. 73. Also see 68th Cong., 2d sess., *House Doc. no. 661, House Manual*, p. 127.

[2] May, Sir Erskine, *Parliamentary Practice* (London, 1924), p. 313, says: "Why the power of administering oaths, which by the laws of England has been considered essential to the discovery of truth, and which must have been inherent in the high court of Parliament, has been retained by one branch of it and severed from the other, can not now be satisfactorily established. The two houses in the course of centuries have appropriated to themselves different kinds of judicature, but the one has exercised the right of administering oaths without question, while the other, except as already mentioned, has never asserted it."

of Congress has never been asserted in favor of the Senate. The latter, although a continuing body, unlike the House of Representatives, has decided that it has no power to punish a contumacious witness or an offender against its privileges, by imprisonment beyond the expiration of the pending session [1] as did the House of Representatives in the case of Patrick Woods.[2]

The appointment of a special committee by the House of Representatives in the case of Robert Randall,[3] the first arising in either House, "to report a mode of proceedings" was followed by the Senate in the case of William Duane,[4] and the forms and methods then adopted were substantially followed in both Houses of Congress until the passage of the Act of January 24, 1857.[5]

The question as to whether the Senate or the House of Representatives was bound to follow the principles of a court of law, or whether its proceedings should be regulated and governed by its own judgment and discretion, as occasion required, raised in both the House and the Senate, in the cases respectively of Robert Randall and William Duane, was reviewed and fully discussed in the debates in the Senate on the case of John Smith,[6] a Senator from Ohio, whose expulsion from the Senate was proposed "in consequence of the part which he took in the conspiracy of Aaron Burr against the peace and prosperity of the U. S. etc." and was also discussed in the unanimous report recommending his

[1] See "Cases of Z. L. White and H. J. Ramsdell," 42d Cong., 1st sess., *Cong. Globe*, p. 486 *et seq.*

[2] 41st Cong., 2d sess., *Cong. Globe*, p. 4317 *et seq.*

[3] 4th Cong., 1st sess., *House Journal, Proceedings*, December 28, 1795, or 1 *Amer. State Papers*, p. 125.

[4] 6th Cong., 1st sess., *Senate Journal, Proceedings*, February 26, 1800.

[5] 2 *U. S. Statutes at Large*, p. 155.

[6] 10th Cong., 1st sess., *Annals*, pp. 265 to 324.

expulsion, made by John Quincy Adams from the select committee appointed to inquire,

> whether it be compatible with the honor and privileges of this House that John Smith, a Senator from Ohio, against whom bills of indictment were found at the Circuit court of Virginia, held at Richmond, in August last, for treason and misdemeanor, should be permitted any longer to have a seat therein.

That question has been raised in most of the various committees of investigation from that time to the present, though the decisions have been uniform by such committees, as well as by the two houses of Congress, that they were not bound to follow the principles of courts of law in conducting such investigations.

The inquisitorial power was at first used for investigating charges against public officers, a duty on its face judicial. Congress established the right to compel information about the administration of the law long before that of compelling information to aid in the making of the law. In 1792, three years after the Constitution went into effect, the House passed a resolution,[1] "that a committee be appointed to inquire into the cause of the failure of the expedition under General St. Clair, and that the committee be empowered to call for such persons, papers and records as may be necessary to assist their inquiries." Before the resolution was passed there was an extended debate in which the constitutionality of the investigation was discussed. In this case, the first resolution suggested to the House was that the President institute an inquiry into the causes of the defeat of the army under St. Clair. This resolution was defeated mainly through the efforts of Representative H. Smith of South Carolina, who observed

[1] Hinds, A. C., *Precedents of the House of Representatives of the United States* (Washington, 1907-8), sec. 1725; 3 *Annals of Congress*, p. 490 *et seq.*

that this was the first instance of a proposition on the part of this House to inquire into the conduct of officials who are immediately under control of the executive. In this view of the subject, the resolution proposed could not but be considered as an impeachment of the conduct of the first magistrate.

Mr. Smith then adverted to the division of powers of government expressly provided for in the Constitution. He said:

> Gentlemen have discovered great solicitude to keep the branches of government separate and distinct, but on this occasion from the consideration that this House is the grand inquest of the nation, they seem to discover a disposition to go into a similar mode of conduct with the National Assembly of France, who spent a whole night examining a drum major.

According to the clerk who wrote the record, Mr. Smith would not say that they had not a right to do so, but he believed no gentleman would justify such a line of conduct on the part of this House. He particularized the several objects of inquiry in relation to the present subject and showed that the Constitution had made provision in all the several cases. And as it was the duty of the President of the United States to carry the laws into execution, it ought to be shown that he had been remiss in his duty before he was called upon in this way. After some further discussion the resolution approving an investigation by a committee of the House was adopted.

The investigation of General St. Clair led to the appearance of Alexander Hamilton before a select House committee of inquiry. The Secretary of War also appeared before this committee, the first appearance of cabinet officials before a House committee. The investigation of this committee led to the vindication of Hamilton's conduct.

As early as 1795 the House considered a bribery case.[1]

[1] Cases of Robert Randall and Charles Whitney, 1 *Amer. State Papers* p. 125, or, 4th Cong., 1st sess., *House Journal*, Dec. 28, 1795.

In this year information was given to the House by certain of its members that they had been approached by Randall and Whitney to obtain their support to a memorial to be presented by the said Randall on behalf of himself and others for a grant of land containing some twenty million acres, bordering on Lakes Erie, Huron and Michigan. The House regarding said information as a sufficient evidence of a contempt of and a breach of its privileges, and as an unwarranted attempt to corrupt the integrity of its members, adopted a resolution ordering the Speaker to issue his warrant, directed to the Sergeant at Arms, commanding him to take into custody, wherever to be found, the body of said Randall, and to keep the same in his custody subject to the further order of the House. The warrant was accordingly prepared, signed by the Speaker under his seal, attested by the Clerk, and delivered to the Sergeant at Arms with orders forthwith to execute the same and make due return thereof to the House.

Many important arguments developed in the House in the debate concerning the proper mode of proceeding in Randall's case. The next day after the warrant was issued, the Sergeant at Arms reported to the House that he had Randall and Whitney in custody subject to its further order and direction. The House immediately appointed a committee on privileges with instructions to report a mode of proceeding in the case, which committee forthwith reported a resolution, which was adopted providing that the said Randall and Whitney be brought to the bar of the House and interrogated by the Speaker touching the information given against them on written interrogatories, (which, with the answers thereto, were to be entered in the Journal of the House); that every question proposed by a speaker be reduced to writing, and a motion made that the same be put by the Speaker; and that after such interrogatories were

answered, any further inquiry on the subject, if the House deemed it necessary, should be conducted by a committee of the House.

Mr. Randall was then brought to the bar of the House and answered that he was not prepared to admit or deny the charge against him and asked the right of counsel and time to make his defense. Some members wanted him tried immediately before the whole House without counsel, saying that the attendance of witnesses and counsel would cause unnecessary delays and difficulties. Others pointed out the inconvenience attending the discussion of facts by so large a body. Several precedents were cited to show that Congress had proceeded in almost every case by select committees. Also the point was made that it was the right of every citizen of the United States to have counsel in such proceedings and was not merely a matter of privilege. Mr. Sedwick of Massachusetts said, "The circumstances of the House being both accuser and judge affords very great reason why the prisoner should be allowed counsel." Finally the House granted the request of Randall as to time and counsel.

Mr. W. Smith, representative from South Carolina, one of the members approached by the accused, made one of the best speeches in the debates on this case in that it seemed greatly to influence the action of the House. In brief he said:

> The present inquiry was of a special and peculiar nature resulting from the rights and privileges which belonged to every legislative assembly, and without which, such institutions could not exist. As every jurisdiction had necessary powers for its preservation, so the legislature possessed certain powers incident to its nature and essential to its very existence. This is called in England the parliamentary law and as from that law are derived the usages and proceedings of the several state legislatures, so will the proceedings of this House be generally

guided by the long established usages of the state legislatures. There would be manifest absurdity in conforming the proceedings in this case to the ordinary proceedings at law in jury trials, for the House, instead of being able to protect itself would be altogether dependent on the other branches of the government and in every case of aggression be obliged to send the offenders to the civil magistrate.

In the precedents which had come to his knowledge, he found the practice to be this:

The prisoner on being brought to the bar, was interrogated as to the charges. If he admitted them, he was either reprimanded and discharged, or committed to prison, to abide the further order of the House, but such imprisonment could not continue beyond the session. If he denied them, an inquiry was had before a select committee who had reported the facts to the House.

There was some argument as to the necessity of giving oaths to witnesses. Some held it unnecessary, especially in the case of members of Congress, as they had already taken an oath. Other members, like Mr. Madison held that, "No citizen can be punished without the solemnity of an oath to the fact. Of consequence it is needful to the information of members, if the punishment of a fellow citizen is implicated." The argument that members of Congress had already taken an oath and did not need to take another in cases where they acted as witnesses, was dismissed without much debate.

A report was brought in on the 31st of December by the Committee on Privileges as to the proper mode of proceedings. Their most important recommendations were, that: 1. an order be issued requesting the judge of the District of Pennsylvania to attend the House for the purpose of administering oath or affirmation to all witnesses; 2. on every

debate the prisoners and their counsel shall withdraw; 3. all questions shall be put by the Speaker. The report was adopted by the House.

In Randalls' second appearance before the House his counsel, Mr. Tilgman, made a strong plea for him, stating:

> It by no means follows, that because the privileges of the House of Commons extend to a certain degree, this country will bear the same extent of privileges in their representatives. The House has the privilege essential to its existence to protect itself from any insult within or without, but no further. The Constitution says nothing of privileges that reach to the prisoner, and one of the amendments to it says, that the people shall be understood to have retained whatever they have not granted. It follows then, that since what has been expressly granted reaches not to Randall, that it is retained.

After questioning both Randall and Whitney and becoming convinced that the evidence was clear that Randall had made attempts to bribe members, the House passed the following resolution, January 4, 1796: "Resolved, That it appears to this House that Robert Randall has been guilty of a contempt of, and a breach of the privileges of, this House, by attempting to corrupt the integrity of its members in the matter laid to his charge." The resolution was adopted by a vote of 78 to 17. In pursuance of an order of the House, Randall was then brought before the bar of the House and reprimanded by the Speaker and remanded to the custody of the Sergeant at Arms. He remained as a prisoner of the House until January 13, 1796, when he was discharged from custody on payment of fees. Whitney was discharged on January 5, 1796, the evidence not being sufficiently clear against him. No further action was taken in respect to either of them.

This case is important not only because of the facts mentioned previously, but also for the reason that it was the first

example of a trial for contempt occurring in either House of Congress in which the power to summon witnesses, compel them to testify, and to inflict punishment, either by fine or imprisonment, or both, was asserted and exercised.

As early as 1796 the House of Representatives requested President Washington to lay before it certain papers relating to the negotiation of the Treaty with the King of Great Britain. The President refused the request, pointing out that the assent of the House is not necessary to the validity of a treaty and that the Treaty exhibited in itself all the objects requiring legislative provision. He wrote—"As it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request." [1]

In the impeachment of William Blount, resolutions were agreed to by the House to the effect that:

A committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States impeached by this House of high crimes and misdemeanors; and that the same committee have power to sit during the recess of Congress, and to send for persons, papers and records.[2]

The case of William Duane,[3] was the first arising in either House of Congress in which false, scandalous and defamatory publications in newspapers regarding either body were taken cognizance of. The first resolution passed by the Senate in this case gives reasons for taking Duane into custody. Resolved,

[1] 1 Richardson, J. D., *Messages of the Presidents* (Washington, 1896-9), p. 196.

[2] 5th Cong., *Annals*, July 8, 1797, pp. 463, 464, 466.

[3] 6th Cong., 1st sess., *Senate Journal, Proceedings*, Feb. 26, 1800, *et seq.*

That the Committee of Privileges be, and they are hereby, directed to consider and report what measures it will be proper for the Senate to adopt in relation to a publication in a newspaper printed in the city of Philadelphia on Wednesday morning, the 19th of February, 1800, called the General Advertiser, or Aurora, in which it is asserted that the bill prescribing the mode of deciding disputed elections of the President and Vice President of the U. S. had passed the Senate when, in fact, it had not passed, in which it is also asserted that the Hon. Mr. Pinckney, a Senator from the State of South Carolina, and a member of the committee, who brought before the Senate the bill aforesaid, had never been consulted on the subject, whereas, in fact, he was present at each meeting of the committee; and generally to report what measures ought to be adopted in relation to sundry expressions contained in said paper respecting the Senate, and the members thereof, in their official capacity.

The Committee on Privileges considered the publication complained of in the preceding resolution and in its report to the Senate recommended the adoption of the following resolution, Resolved:

That the said publication contains assertions and pretended information respecting the Senate and the Committee of the Senate, and their proceedings, which are false, defamatory, scandalous and malicious, tending to defame the Senate and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States; and that the said publication is a high breach of the privileges of this House.

The resolution further ordered the appearance of William Duane before the bar of the Senate to answer for his conduct.[1]

Previous to appearing before the Senate, Duane wrote a letter to the Vice President of the United States, requesting the privilege of being heard by counsel and of having process

[1] 6th Cong., 1st sess., *Senate Journal*, March 20, 1800.

awarded to compel the attendance of witnesses in his behalf.[1] While the debate was in progress concerning his request, he appeared before the Senate and the charge against him was read. He repeated his request to be heard by counsel and a motion was adopted by a vote of 18 to 11 that it be granted and he be given several days to prepare his defense. He failed however to put in an appearance as requested by the Senate, sending them a letter explaining that he felt that he could not get a fair trial and thus declined further voluntary attendance upon that body. His letter was referred to the Committee on Privileges,[2] on motion of the Senate, and it reported back a resolution containing a statement of the letter and holding him guilty of a contempt of the order of the Senate and directing that for said contempt, he, be taken into custody of the Sergeant at Arms and kept subject to the further orders of the Senate.[3] The resolution was adopted by a vote of 16 to 11. In disposing of this case the Senate adopted two more resolutions, the first charging the Sergeant at Arms with the duty of taking into his custody the body of the said William Duane and keeping him safely subject to the further order of the Senate; and all marshals, deputy marshals and civil officers were ordered to assist him in executing this warrant.[4]

The second resolution approved by the Senate was as follows: Resolved,

That the President of the United States be requested to instruct the proper law officer to commence and carry on a prosecution against Wm. Duane, editor of the newspaper called the Aurora, for certain false, defamatory, scandalous and malicious publications in said newspaper of the 19th of February last tending to

[1] 6th Cong., 1st sess., *Senate Journal*, March 24, 1800.

[2] The committee was given power to send for persons and papers.

[3] *Ibid.*, March 27, 1800.

[4] *Ibid.*

defame the Senate of the United States and to bring them into contempt and disrepute, and to excite the hatred of the good people of the United States against them.[1]

The subsequent history of this case indicates that an indictment was found against Duane for libel of the Senate and he was sentenced to be imprisoned for thirty days, to pay the costs of prosecution, and stand committed until this sentence was complied with.[2]

Duane's case developed a bitter debate in the Senate as to the general powers of the Congress to punish for contempts and compel testimony. One of the strongest speeches made in opposition to any extension of the powers of Congress in this respect was that of Senator Charles C. Pinckney of South Carolina. He expressed himself unreservedly for a strict construction of congressional powers, saying that he wished to

entreat the Senate to recollect the nature of our federal system; that powers not expressly and specifically delegated to Congress, are reserved to the States and the people; and particularly to remember, that where any powers are so expressly defined as the privileges of Congress are, it is our duty very carefully to consider the consequences before we take a step that may, by subsequent or cool reflection, be found to exceed them, that the privileges of Congress, as limited by the Constitution, have been very carefully considered by men whose opinions were not swayed by party, and whose impartial situation gave the best opportunity for judging, who having before them the example of the unlimited privileges of the British Parliament and the colonial assemblies, or councils, assuming to themselves the right of such privileges; who knowing the consequences of undefined powers, and being well aware what privileges were necessary to prevent the interruption of the undisturbed situation a member should enjoy, during the time he is engaged on public

[1] 6th Cong., 1st sess., *Senate Journal*, March 27, 1800.

[2] 53d Cong., 2d sess., *Senate Misc. Doc. no. 12*, p. 17.

affairs, after much thought they had defined them in the manner fixed by the Constitution.[1] The powers they (Congress) are to exercise, and the persons and cases they are to operate upon, are all distinctly marked and named; nor is there a word or sentence in the whole that can by any possible construction be made to mean that for any libels or printed attack on the public conduct or opinions of either House of Congress, or any of its members, that their privilege shall extend to ordering the persons charged with the offence before them, and imprisoning them at their will.[2]

To the argument that

Each House must possess this power to punish for breach of privileges, which they must judge of as circumstances may arise and require, that every legislative body, or branch of one, possesses an inherent right to protect itself, which must be exercised as their discretion directs, because it may be frequently necessary to exercise it immediately when the public safety would make it impossible to wait for reference to other bodies or tribunals, and that this reasoning was strengthened by the practice and precedents of the British Parliament, and the colonial legislatures before the Revolution, and most of the state legislatures since, and was now universally received as the true doctrine on this subject;

Pinckney's answer was:

That is the doctrine of the British Parliament I will allow, but it was because the doctrines there held are utterly inadmissible in a free government, and to prevent any influence from them, and their precedents, and the improper practice of the colonial and state legislatures, that this limitation of the privileges of Congress was here purposely introduced.[3]

[1] 6th Cong., 1799-1801, *Senate Proceedings*, March 5, 1800 or 6th Cong. *Annals*, p. 70.

[2] 6th Cong., 1st sess., *Annals*, p. 71.

[3] *Ibid.*, p. 74.

As to the liberty of the press, Pinckney stated, "I well know that where the press is not free, liberty is but a name, and government a mockery." [1] The true standard of the press should be, he believed, as follows:

That the printing press shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of the Government, and no law shall ever be made to restrain the right thereof; that the free communication of thoughts and opinions is one of the most invaluable rights of man, and every citizen may freely speak, write and print, on any subject, being responsible for the abuse of that privilege; that in prosecutions for the publication of papers investigating the official conduct of officers, or men in an official capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

In the further development of his argument against the procedure contemplated by the Senate in Duane's case, Pinckney asked the questions: How far, in the case of libels or attacks in the papers, for their political opinions, any single branch ought to possess the powers, perhaps in a moment of passion or resentment, to decide on what is to affect the personal liberty of a citizen? Whether it is consistent with the nature of our government, that a single branch, without check or control, should become judges in their own case? Whether any citizen charged with a crime, for which he may be punished by the temporary loss of liberty, is not entitled by the Constitution, to a speedy trial, by an impartial jury? And whether to deny it, in this instance, would not be to interfere with that provision in the Constitution. His answer was, "For my own part I have no doubt of it; and feeling as I do, most jealous for the character of this branch, I am

[1] 6th Cong., 1st sess., *Annals*, p. 82.

apprehensive, should we proceed in this measure, it may occasion unpleasant observations." [1]

Mr. Cocke, a member from Tennessee, was also strong in his denunciation of an extension of the power of the Senate to punish for contempts or breaches of privileges, holding that such an extension was

contrary at least to three amendments to the Constitution, first, that all the powers which are not given to the United States are reserved either to the States or to the people,[2] second, that every man shall be secure in his person and papers from unlawful searches and seizures,[3] and third, no person shall be called upon in any criminal case to give testimony against himself.[4]

Senator Tracy of Connecticut was the most important proponent of the resolutions passed by the Senate in this case. He claimed that the resolution recommended to the Senate by the Committee of Privileges did not carry action beyond what was prudent, mild and proper, that the Committee wanted to find out who the editor of the *Aurora* was, that this was a proper inquiry, for the editor was not generally known. He said further:

The gentleman had told us (Mr. Pinckney) it is no crime to publish the doings of this body; agreed, but is it nothing to publish untruths respecting the official conduct of the members of this body? It is no crime to publish a bill before this House. But are printers at liberty to tell lies about our transactions? The Aurora says that the bill which it published had passed the Senate; this every member knows to be contrary to the fact. The bill has not even to the present moment passed this body, it is still on your table liable to recommitment, amendment or

[1] 6th Cong., 1st sess., *Annals*, p. 82.

[2] Federal Constitution, 10th Amendment.

[3] Federal Constitution, 4th Amendment.

[4] Federal Constitution, 5th Amendment.

rejection. Asking the editor how he came to print this falsehood does not go to examine into the private mode by which conveyance of intelligence is made to that office, there can be no real intelligence, it is a falsehood. But suppose we have no power over this editor, because the press is free, suppose that we cannot punish him for his calumny, slander and falsehood, perhaps the inquiry will lead us to discover some person whom we can punish; will it be said that the Constitution is an impediment in our way to punish one of our own members if he should be found guilty of abusing the confidence of his station? The gentlemen had declared themselves the champions of the press, but surely gentlemen would not advocate such liberty as this, the liberty of publishing nothing but lies and falsehood. If by the liberty of the press is meant the publication of truth and just political information, it was proper to be supported; but he was desirous of maintaining along with the liberty of the press, the liberty of the citizens, and the security of the government; he was not for sacrificing these later objects to the licentiousness of the press.[1]

Moreover Senator Tracy believed that it was as requisite to maintain the privileges of the Senate as it was to support the liberty of the press, that Congress should in defining what may be privilege, govern itself according to the original intention in mentioning privileges in the Constitution, viz. to promote the general interests of the citizens, and here it could be guided only by sound discretion and common sense. He concluded by saying:

On the principle of self preservation, which results to every public body of necessity and from the nature of the case, the right of self preservation is vested in the Senate of the United States, as it is in your courts of justice and other public institutions.[2]

[1] 6th Cong., 1799-1801, *Senate Proceedings*, March 5, 1800, p. 86.

[2] *Ibid.*, p. 87.

The questions settled in this case were: (1) could the Senate in an investigation concerning an alleged libel published in the newspapers, compel the attendance of witnesses and punish for refusal to attend? (2) Could a person accused by the Senate of libel be imprisoned by that body for refusing to appear before its bar and then be punished by prosecution in the courts for libel, although there was no law providing for such punishment? They were decided, as already noted, in the affirmative. We are more concerned in this study with the discussion on the first question, namely that the Senate had jurisdiction and power to make such compulsory investigations as this although no such power was distinctly conferred on either branch of Congress. A study of the debates in this case shows very clearly two opposing viewpoints as to the inquisitorial power of Congress. One group favored a loose interpretation of the enumerated privileges of Congress, hence it believed that the publication in newspapers of " false, scandalous and defamatory material " was a libel on the Senate and that the Senate had the power to authorize a compulsory investigation of such charges, to summon witnesses and punish them in case of contempt. In this case Duane was held in contempt the moment he refused to appear, as requested, before the Senate. The strongest argument of the proponents of the power exercised in this case, was that necessity demanded it, that it was based on the principle of self-preservation.

The other group believed that such an exercise of power was unconstitutional for several reasons, first, no such authority was distinctly mentioned in the Constitution, second, the exercise of such power was opposed to the liberties of the citizen as guaranteed in the first ten amendments to the Constitution, third, the fact that Parliament had exercised such power had no influence here, as Congress was a body of enumerated powers.

The result of this case was an extension of the power asserted and exercised in the cases already mentioned.

In connection with our study of this case, it is interesting to note the comment of Thomas Jefferson, who was President of the Senate at the time this case came up.

The editor of the Aurora, having in his paper of February 19, 1800, inserted some paragraphs defamatory to the Senate, and failed in his appearance, he was ordered to be committed. In debating the legality of this order it was insisted in support of it that every man by the law of nature, and every body of men, possesses the right of self defense; that all public functionaries are essentially invested with the powers of self preservation; that they have an inherent right to do all acts necessary to keep themselves in a condition to discharge the trusts confided to them; that whenever authorities are given, the means of carrying them into execution are given by necessary implication; that thus we see the British Parliament exercise the right of punishing contempts; all the state legislatures exercise the same power, and every court does the same; that if we have it not, we sit at the mercy of every intruder who may enter our doors or gallery, and by noise and tumult, render proceeding in business impracticable, that if our tranquillity is to be perpetually disturbed by newspaper defamation, it will not be possible to exercise our functions with the requisite coolness and deliberation; and that we must therefore, have a power to punish these disturbances of our peace and proceedings. To this it was answered that the Parliament and courts of England have cognizance of contempts by the express provisions of their law; that the state legislatures have an equal authority because their powers are plenary; they represent their constituents completely and possess all their powers, except such as their constituents have expressly denied them; that the courts of the several states have the same powers, by the laws of their states, and those of the Federal Government by the same State laws adopted in each State by a law of Congress; that none of these bodies therefore, derive those powers from natural or necessary right, but

from express law; that the houses of Congress have no such natural or necessary power, nor any powers but such as are given them, directly, exemption from personal arrest, exemption from question elsewhere for what is said in their House, and power over their own members and proceedings; for these, no further law is necessary, the Constitution being the law, that, moreover by that article of the Constitution which authorizes them, "to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in them", they may provide by law for an undisturbed exercise of their functions, e. g. for the punishment of contempts, of affrays and tumults in their presence, etc. but till the law be made it does not exist, and does not exist, from their own neglect; that in the meantime, however, they are not unprotected, the ordinary magistrates and courts of law being open and competent to punish all unjustifiable disturbances, and defamations, and even their own Sergeant, who may appoint deputies *ad libitum* to aid him (3 Grey 59, 147, 255) is equal to small disturbances, that in requiring a previous law, the Constitution had regard to the inviolability of the citizen as well as of the members; as, should one House, aim at too broad privileges, it may be checked by the other, and both by the President, and also as the law being promulgated, the citizen will know how to avoid offense. But if one branch may assume its privileges without control, it may do it on the spur of the occasion, conceal the law in its own breast, and after the fact committed, make its sentence both the law and the judgment on the fact; if the offence is to be kept undefined, and to be declared only *ex re nata*, according to the passions of the moment, and there be no limitation either in the manner or measure of the punishment, the condition of the citizen will be perilous indeed. Which of these doctrines is to prevail, only time can tell. Where there is no fixed law, the judgment on any particular case is the law of that case only, and dies with it. When a new and even similar case arises, the judgment which is to make and at the same time apply the law is open to question and consideration, as are all new laws. Perhaps Congress, in the mean-

time, in the care for the safety of the citizen, as well as for their protection, may declare by law what is necessary and proper to enable them to carry into execution the powers vested in them, and thereby hang up a rule for the inspection of all, which may direct the conduct of the citizen, and at the same time test the judgments they shall themselves pronounce in their own case.[1]

The executive department of the government very early recognized that the Congressional power of appropriation implied a right to investigate the expenditures of the public moneys. On November 24, 1800, the Speaker laid before the House a letter from Wolcott, Secretary of the Treasury, stating that the President had accepted his resignation and, because of recent criticism of his administration, freely submitted the whole of his conduct to "any investigation which the House of Representatives may be pleased to institute."[2] The next day the letter was referred to a select committee to consult precedents as to the manner in which the inquiry was to be made.[3] A week later Otis at the request of the committee moved an instruction to "examine into the state of the Treasury, the mode of conducting business therein, the expenditures of the public money, and to report such facts and statements as will conduce to a full and satisfactory understanding of the state of the Treasury, since the appointment of the secretary."[4] No power was requested by the committee to send for persons and papers as its chairman considered that for the present, "it would be best to leave the committee at large to make the investigation in such way as they, in the progress of their inquiries, should consider most satisfactory." The fact was, of course, that

[1] *Jefferson's Manual,* Senate ed. 1892, p. 194.

[2] 6th Cong., 2nd sess., *Annals,* p. 786 (1800).

[3] *Ibid.,* p. 788.

[4] *Ibid.,* p. 796.

the willingness of the Treasury to submit itself to investigation made it unnecessary for the committee to request the House to grant it the power to send for persons and papers. The committee in its report, "after a thorough examination of the accounts, absolved Wolcott from all charges of misconduct." [1]

The conduct of Winthrop Sargent, Governor of Mississippi Territory, was investigated in the same year by the House. The resolution authorizing the investigation read as follows: "that a committee be appointed to inquire into the official conduct of Winthrop, which shall be authorized to send for persons, papers and records." [2] During the debate on the resolution, it was moved to drop out the provision granting the committee the right to send for persons and papers. The motion was lost without a division and the motion adopting the resolution above was passed by a vote of 70 to 11.[3]

On November 27, 1807, Senator Thurston of Kentucky offered the following resolution in the Senate: Resolved,

> That a committee be appointed to inquire whether it be compatible with the honor and privileges of this House that John Smith, a senator from the State of Ohio, . . . should be permitted any longer to have a seat therein; and that the committee do inquire into all the facts regarding the conduct of Mr. Smith, as an alleged associate of Aaron Burr and report the same to the Senate.[4]

It seems that Mr. Smith had taken some part in the conspiracy of Aaron Burr against the United States and this resolution had followed as a result.

[1] 6th Cong., 2nd sess., *Annals*, p. 986.

[2] *Ibid.*, p. 848.

[3] *Ibid.*, p. 853.

[4] 10th Cong., 1st sess., *Senate Proceedings*, Nov. 27th, 1807.

In supporting his resolution, Senator Thurston stated that the Senate, in a case of this sort, was not bound by the technical rules of law, as rigidly observed in courts. Various considerations compelled them to pay particular regard to their character and convenience. Hence the Constitution had conferred upon them an unlimited power to expel a member. In such cases they were constituted both accusers and judges, in direct violation of the common principles of the law. A member might be expelled for acts which would not render him amenable to a court of justice. Hence the Senate might decide upon what appeared credible testimony, even though it were not of such a character as would be admitted in a court of law.[1]

Several objections were made to the effect that the resolution gave the committee too wide a latitude, but they were overruled and the resolution was adopted. The committee was appointed with John Quincy Adams as Chairman, on December 4, 1807. On December 31, 1807, Senator Adams brought in the report in the case of Smith. This report is very important as it illustrates the prevailing attitude towards some of the fundamental questions arising out of the exercise of the inquisitorial power of Congress. The main points brought out in the report were as follows:

Your committee are of opinion that the conspiracy of Aaron Burr and his associates against the peace, union, and liberties of these states, is of such a mass of mutually corroborative testimony, that it is incompatible not only with the honor and privileges of this House, but with the deepest interests of this nation, that any person engaged in it should be permitted to hold a seat in the Senate of the United States. Whether the facts, of which the Committee submit herewith such evidence as, under the order of the Senate, they have been able to collect, are suffi-

[1] 10th Cong., 1st sess., *Senate Proceedings*, Nov. 27th, 1807.

cient to substantiate the participation of Mr. Smith in that conspiracy or not, will remain for the Senate to decide. The committee submit also, to the consideration of the Senate, the correspondence between Mr. Smith and then, through their chairman, in the course of their meetings. The committee have never conceived themselves invested with authority to try Mr. Smith. Their charge was to report an opinion relating to the honor and privileges of the Senate, and the facts relating to the conduct of Mr. Smith. Their opinion, indeed, cannot be expressed in relation to the privilege of the Senate without relating at the same time to Mr. Smith's right of holding a seat in this body, but, in that respect, the authority of the committee extends only to proposal, and not to decision. But as he manifested a great solicitude to be heard before them, they obtained permission from the Senate to admit his attendance, communicated to him the evidence in their possession, by which he was inculpated, furnished him in writing, with the questions arising from it, which appeared to them material, and received from him the information and explanation herewith submitted as part of the facts reported. But Mr. Smith has claimed, as a right, to be heard in his defense by counsel, to have compulsory process for witnesses, and to be confronted with his accusers, as if the Committee had been a Circuit Court of the United States. But it is before the Senate itself that the committee conceived it just and proper that Mr. Smith's defense of himself should be heard. Nor have they conceived themselves bound in this inquiry by any other rules than those of natural justice and equity due to a brother Senator on the one part and to their country on the other.

Mr. Smith represents himself, on this inquiry, as solitary, friendless, and unskilled, contending for rights which he intimates are denied him; and the defender of senatorial privileges, which he seems apprehensive will be refused him by Senators, liable as long as they hold their offices, to have his case made their own. . . . The committee have dealt out to Mr. Smith that measure, which, under like circumstances, they would be content to find imparted to themselves; and they have no hesitation in declaring, that, under such imputations, colored by such evidence,

they should hold it a sacred obligation to themselves, to their fellow Senators, and to their country, to meet them by direct, unconditional acknowledgment or denial, without seeking a refuge from the broad face of day in the labyrinth of technical forms.

In examining the question, whether these forms of judicial proceeding or the rules of judicial evidence, ought to be applied to the exercise of that censorial authority which the Senate of the United States possesses over the conduct of its members, let no one assume, as the test of their application, either the dictates of unfettered reason, the letter and spirit of the Constitution, or precedents domestic and foreign, and your committee believe the result will be the same; that the power of expelling a member must, in its nature, be discretionary, and its exercise always more summary than the tardy process of judicial tribunals. . . . Must the assembled rulers of the land listen with calm and indifference, session after session, to the voice of notorious infamy, until the sluggard step of municipal justice can overtake his enormities? Must they tamely see the lives and fortunes of millions, the safety of present and future ages, depending upon his vote, recorded with theirs, merely because the abused benignity of general maxims may have remitted to him the forfeiture of his life?

Such in very supposable cases, would be the unavoidable consequences of a principle which should offer the crutches of judicial tribunals as an apology for crippling the Congressional power of expulsion. Far different, in the opinion of your committee, is the spirit of our Constitution. They believe that the very purpose for which this power was given was to preserve the legislature from the first approaches of infection. That it was made discretionary because it could not exist under the procrastination of general rules; that its process must be summary, because it would be rendered nugatory by delay.

With reference to the 5th and 6th articles amendatory to the Constitution, which certain Senators had protested in the debates in this case, were violated by the *procedure of*

the committee, the committee report stated they understood *these articles as referring to prosecutions at law.* To suppose that they were *regarded as restrictions upon powers expressly granted by the Constitution to the legislature,* or either of its branches, would, in a manner, annihilate the power of impeachment as well as that of expulsion. It would lead to the absurd conclusion that the authority given for the purpose of removing iniquity from the seats of power should be denied its exercise in precisely those cases which most loudly call for its energies.

In concluding its report, the committee submitted the following resolution to the Senate: Resolved,

That John Smith, a Senator from the State of Ohio, by his participation in the conspiracy of Aaron Burr against the peace, union and liberties of the people of the United States has been guilty of conduct incompatible with his duty and station as a Senator of the United States and that he be expelled from the Senate of the United States.[1]

Senator Smith was ordered by the President of the Senate to be present at the reading of this report. At its conclusion he submitted an answer asking that he might be heard by counsel and that he might have an opportunity of a trial under the same rules of evidence as prevail in judicial tribunals. He also claimed that all the evidence adduced by the committee, was either taken *ex parte,* or without allowing Mr. Smith sufficient time to interrogate the witnesses. After this letter was read in the Senate, Mr. Smith got the floor and submitted his requests in the form of a motion as follows: "That John Smith be informed specifically of the charges against him; that he be allowed to make a defense against such charges, and have process to compel the attendance of witnesses, and the privilege of being heard by

[1] 10th Cong., 1st sess., *Senate Proceedings,* Dec. 31, 1807.

counsel." No one seconded his motion so the President of the Senate said he would consider it as an application to the Senate.[1]

Mr. Adams speaking in the following debate held that with regard to the first and second requests, it was neither consistent with the powers of the Senate, nor proper to grant them. He thought it all right however to allow Smith counsel. A motion that Mr. Smith be heard by counsel not exceeding two was carried unanimously.[2]

Mr. Smith was then examined by the Senate which passed a resolution agreeing to listen to "such testimony as John Smith, Senator from the State of Ohio, may then adduce in his defense." Witnesses were called, making voluntary appearance, sworn and cross examined.

A very important point that came up in the subsequent trial of Mr. Smith was whether the Senate had power to compel the attendance of witnesses. A resolution was submitted to the Senate authorizing the issue of a subpoena or summons in the usual form, to cause to be summoned to appear before the Senate, certain persons named in the summons.[3]

Mr. Adams objected to the issue of such an order, denying the power of the Senate in the premises. He said:

This resolution required a subpoena to be issued in the usual form. What form? If it were meant that it should be in the usual form prescribed in a court of law, I doubt whether the power to issue it resides in the Senate. The process of a court is issued under law, and under a penalty attached to non attendance. Should a witness refuse to attend, he was liable to further process to coerce his attendance; and the same law likewise provided that witnesses thus summoned should be compensated.

[1] 10th Cong., 1st sess., *Annals*, pp. 66, 78.

[2] *Ibid.*, p. 78.

[3] *Ibid.*, p. 94.

He said he knew of no such power inherent in the Senate. If one witness is summoned the Senate may be called upon to summon a hundred; also the Constitution says that no money shall be drawn from the Treasury but under an appropriation made by law, which requires the concurrence of both Houses. What assurance have we that the other House will authorize the compensation of witnesses? Mr. Adams concluded by saying that the course of proceedings in the Senate was such, that they must take such testimony as they could get, and rest satisfied with collecting it by the best means in their power.[1]

The opposite viewpoint was presented by Mr. Pope, who said:

> I am surprised at the doubts expressed of our power to summon witnesses. If we have a right to inquire into the conduct of a Senator, we have necessarily a right to every incidental power essential to the making of the inquiry. Where the power is given by the Constitution to do a particular thing, I have always deemed it sound construction, that, by necessary implication, every incidental power is given which is necessary to carry the main power into effect.

As to funds Mr. Pope thought that the House would concur in voting necessary expenditures without any difficulty.[2] He was asked what the Senate would do in case Mr. Smith requested certain witnesses in his behalf. Would the Senate be compelled to defray their expenses also? Mr. Pope replied that he thought that such expenses would have to be defrayed by Mr. Smith. The final vote on the resolution was 23-7 against adoption. It will be noted that this action was contrary to that taken in preceding cases where power to summon witnesses had been freely granted.

[1] 10th Cong., 1st sess., *Annals*, p. 94.

[2] *Ibid.*, p. 94.

The counsel for Smith presented a lengthy defense in his behalf,[1] claiming the action of the Senate in this case was unconstitutional, contrary to the 6th and 7th Amendments, that the evidence presented against Mr. Smith was scanty and inefficient, and that the Senate had no jurisdiction in the case.[2]

Mr. Adams refuted these arguments, and claimed that the Senate had jurisdiction of the subject stating:

There is no such limitation in the Constitution, there is none in spirit, and to introduce such an absurdity—that a man might be convicted of the most infamous crimes that can disgrace the human character, and unless their punishment be capital, would be entitled perhaps for years to hold his seat in the supreme councils of the Nation.[3]

With reference to the violation of certain constitutional articles, Mr. Adams said:

They said that by the 6th article amendatory to the Constitution, the trial by jury is secured to every citizen, in all criminal prosecutions. . . . The trial by jury is secured for the decision of questions arising from what the elementary writers on government call the civil rights—the rights which in republican governments are enjoyed alike by all, as subject to the laws. These are altogether different from political rights, which we enjoy as partakers of the public power; as members of the sovereignty. Among these are the rights of electing and being elected, and the rights of office enjoyed by all public functionaries—such is the right possessed by each of us in his seat upon this floor. One of the greatest writers upon the nature of laws, the ingenious and profound Montesquieu, pointedly cautions his readers and all students in the laws, not to confound the rules and principles belonging to these distinct classes of rights. *The right of*

[1] 10th Cong., 1st sess., *Annals*, pp. 117-234.

[2] *Ibid.*, p. 238.

[3] *Ibid.*, p. 238.

trial by jury meant by this article of the Constitution is reserved for the decision of questions affecting the civil, and not the political rights of the citizens.[1]

Mr. Smith's counsel recommended that he be turned over to a Circuit court of the United States for trial by jury, with directions to the proper law officer to commence a prosecution against him and with the whole mass of evidence which has been here produced against him; that the personal attendance of witnesses may be obtained at the proper time and place.[2]

Mr. Adams' rebuttal to this argument was that if the Senate were to follow that suggestion, it would very effectually deprive him of his seat for the rest of the term.

As to the objections of Mr. Smith's counsel to the procedure in taking evidence in this case, Mr. Adams said:

There are doubtless advantages to be gained from the examination of witnesses in person, which cannot be communicated to written depositions. But theoretical perfection must yield to possible practice. The evidence on such an inquiry as this, is, from the necessity of the case, all voluntary. The member whose conduct is implicated, has great advantages for defense, which he would not possess in a court of law. He is defended by the able counsel admitted at your bar, when there is no legal counsel against him. He has the opportunity to collect, with all the industry and activity inspired by his interest, every particle of evidence that can be brought in his favor, while that which appears against him, must come without search. No member of this body can be charged with the duty, and surely none would spontaneously undertake the task of summoning witnesses to attend here in person from the two extremities of the Union; nor, were they summoned, is it at all clear they would be compelled to attend.[3]

[1] 10th Cong., 1st sess., *Annals*, p. 239.

[2] *Ibid.*, p. 239.

[3] *Ibid.*, pp. 242-243.

Mr. Adams reminded his audience that *proceedings of this nature were always in a great degree summary and that the evidence upon which they proceeded is subject to none of the restrictions to which they so rigidly adhere in their courts of law.* It is clear from a study of the committee report made by Mr. Adams and the protests made by Smith to the procedure of the committee that the committee did not, in their collection of evidence and investigation of the charges against Smith, regard the restrictions common in courts of law as applicable to the conduct of their inquiry, but rather considered these proceedings as a summary affair. Mr. Adams, however, certainly ignored the precedent of previous cases in the Houses of Congress when he said that the evidence on an inquiry of this sort is, from the necessity of the case, all voluntary. On April 9, 1808, the Senate voted on the resolution reported by the select committee and rejected it by a vote of 19 to 10, two-thirds of the Senate present not concurring therein.[1] While the Senate voted against the expulsion of Smith, it is obvious that a majority of that body believed that the Senate had the authority to consider the alleged acts of Smith as a contempt and the power to try him before its bar under whatever rules it saw fit to apply, that the constitutional guarantees of right to trial by jury, right to counsel et cetera had no application to such proceedings.

The House again exercised its right of investigation into the expenditure of the public money in 1809, by the adoption of a resolution for the appointment of a committee to inquire whether advances had been made by the War Department to the Commander in Chief of the Army, contrary to law.[2] Mr. Randolph in proposing the resolution told the House that it had no right so important as the control which it constitutionally exercises over the public purse. He said:

[1] 10th Cong., 1st sess., *Annals*, p. 323.

[2] 10th Cong., 2nd sess., *Annals*, pp. 1330-31.

To what purpose is that control? The mere form of appropriating public money, unless this House rigorously examine into the application of the money thus appropriated; unless the House examine if the amount of the appropriation is exceeded by the expenditure; or if it be misapplied, that is, if money appropriated for one object be expended for another; unless we do this, sir, our control over the public purse is a mere name—an empty shadow. . . . Whenever charges are brought against any administration, the only way in which they can be repelled, is by a frank, full and impartial inquiry into the matter constituting those charges.

The resolution did not confer upon the committee any power to send for persons and papers.

The grave charges which had been made against General Wilkinson caused Pearson of North Carolina on March 1, 1810, to propose in the House a resolution providing for the appointment of a committee to "inquire generally into the conduct of the said James Wilkinson, as Brigadier General of the Army of the United States; that the said committee have the power to send for persons and papers, and compel their attendance and production, and that they report the result to this House." [1] The resolution caused a bitter debate. In advocating it Sheffrey said:

Sir, it is our duty to make this inquiry. The public money is expended on these establishments; the labor of the nation supports them. We extract money from the pockets of the people to appropriate to these purposes, and it is proper to ascertain that those who reap the earnings of the people are worthy of the public confidence.[2]

Pitkin, in supporting the resolution said:

that impeachment of a military official was out of the question,

[1] 11th Cong., 2d sess., *Annals*, pp. 1606-07.

[2] *Ibid.*, p. 1746.

but a weightier power, always resident in the legislature, but rarely exercised was the foundation for the creation of this investigating committee, in other words, Congress could abolish the office, if the President refused to heed the request of the committee to remove him.[1]

In further argument for the resolution Sheffrey added that "the true construction of the powers of this House in respect to investigation other than for the purpose of impeachment, is this, we have, 1st, the power to inquire to inform ourselves and the nation; and 2nd, the power to inquire with a view of future legislation."[2] The resolution was finally adopted by a vote of 80 to 29.[3]

In 1818 the House overruled the objection that its inquiry into the conduct of clerks in the executive departments would be an infringement on the executive's power. On January 16, Mr. John Holmes of Massachusetts offered the following resolution:

That a committee be appointed to inquire whether any and what clerks or other officers in either of the Departments, or in any office at the seat of the general government, have conducted themselves improperly in their official duties, and that the committee have power to send for persons and papers.[4]

Objection was made that the House would, by adopting this resolution, assume power over the Departments which belongs to the executive and thus impair executive responsibility. It was answered that the House was in the nature of a grand jury to the nation, and that it was the duty of the House to examine into the conduct of public officers.

During the same year the reports of General Jackson's

[1] 11th Cong., 2d sess., *Annals*, p. 1729.

[2] *Ibid.*, p. 1743.

[3] *Ibid.*, p. 1755.

[4] 15th Cong., 1st sess., *Annals*, p. 783.

assumption of extraordinary powers in waging the Seminole War aroused considerable criticism in Congress. As a result the Senate appointed a select committee with broad powers of investigation under a resolution of December 18, 1818.[1] The committee reported on February 24, 1819 saying that "they have, under the authority conferred on them, called for and examined persons and papers," and censuring General Jackson for usurpation of power, but making no recommendations.[2] This case is important because it marks the first time a Senate committee had acted in an investigation of this type under a grant of power to call for persons and papers. As we have noted, the Senate had previously decided not to use such power in the case of trials before its bar.[3]

One of the most important cases of contempt considered by Congress was that of John Anderson. Originally presented to the House of Representatives as an attempt at bribery on the part of said Anderson in respect to a pending measure and proposed legislation, it immediately took the form of a "Contempt and breach of privileges of the House" causing a very extended debate lasting for eight full days, in which the leading members of the House participated. The main subjects discussed were the powers of the House to punish for contempt and the procedure to be used.[4]

On January 7, 1818, Mr. William, member of the House from North Carolina, laid before the House a letter written to him by Mr. Anderson, and a statement explaining the facts concerning the affair.[5] The substance of the matter was that Anderson had presented a letter to Williams asking him to accept the sum of $500 as part pay for the trouble he

[1] 15th Cong., 2d sess., *Annals*, p. 76.

[2] 15th Cong., 2d sess., Sen. Rep. no. 100, Ser. no. 15.

[3] See Smith's case, *supra*, ch. ii.

[4] For full debate see 15th Cong., 1st Sess., vol. i, *Annals*, pp. 579-790.

[5] *Ibid.*, p. 579.

had caused Williams in getting the River Raisin claims through Congress.[1] Williams immediately considered it as an attempt to bribe him and promptly reported to the House. The House, acting on his information adopted the following resolution: Resolved,

That the Speaker do issue his warrant directed to the Sergeant at Arms attending the House, commanding him to take into custody, wherever to be found, the body of John Anderson, and the same in his custody to keep, subject to the further order and direction of this House.[2]

It was a unanimous vote.[3] Before the vote was taken the question was raised by Mr. Terry of Connecticut, whether, "according to our forms of proceedings, and to our constitutional provisions, a general warrant, as proposed, could be issued. Was it not opposed, in itself, in its nature, to the principles of civil liberty?" [4]

In answer Speaker Clay observed: "In the practice of the House happily, instances were extremely rare, where such a warrant became necessary," no such case had occurred within his observation. "But there could be no doubt," he said, "when an offense was committed against the privileges or dignity of the House, it was perfectly proper and within its power to issue a warrant to apprehend the party offending." [5]

Mr. Livermore of New Hampshire asked, for information merely, whether the facts on which the warrant was to be issued, should not first be substantiated by oath. The statement came, he knew, from a most respectable source; but was not an oath necessary to justify such a warrant? Speaker Clay answered, "Certainly not." [6]

[1] 15th Cong., 1st sess., vol. i, *Annals*, pp. 582, 583.
[2] *Ibid.*, p. 583.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*

The Speaker having informed the House that the Sergeant at Arms had taken the body of John Anderson into custody and held him pursuant to the warrant to him directed, Mr. Forsyth of Georgia submitted the following resolution: Resolved,

That a Committee of Privileges, to consist of seven members, be appointed, and that the said committee be instructed to report a mode of proceeding in the case of John Anderson, who was taken into custody yesterday by the order of the House; and that the same committee have leave to sit immediately.[1]

A debate arose immediately in opposition to this proceeding. Mr. Beecher of Ohio, opposing the resolution, claimed there was no authority for it in the Constitution, that it could not be justified at common law, as the House was not governed by common law, that the great powers assumed by the Parliament of Great Britain had been a matter of great complaint in that country, and he presumed it would not be contended that the practice of that body was to form a rule of conduct for this House, that there was no need of the House possessing the power of arresting and bringing to trial before us, as the courts of justice are open to prosecution and address for any injury of this sort. Finally, he said: "In another part of the Constitution, particular privileges were accorded to members; and the enumeration of particular powers, in any instrument of that character, was in exclusion of all others." [2]

Mr. Livermore of New Hampshire also opposed the resolution vigorously:

Our ideas of Congressional privileges appear to rest on our knowledge of British Parliamentary privileges, which, he conceived, were widely distinct in their natures. In Great Britain,

[1] 15th Cong., 1st sess., vol. i, *Annals*, p. 592.

[2] *Ibid.*, p. 593.

the legislature possesses all power.[1] The Congress of the United States was different he believed. In a case of this kind occuring in Great Britain, an oath would not be required; but we are, in this respect, restricted by the express declaration in the Constitution that no warrant shall issue except sustained by oath.[2]

In addition he believed that the House had no authority over Anderson, admitting the charge against him was substantiated, as there was no statute of the United States, though there were in most of the States, declaring bribery an offense.

Other members opposing the resolution claimed the House did not have discretionary power to punish at pleasure, that many constitutional provisions inhibited the exercise of such power, and finally, if precedents might be found in the Journals of the exercise of such a power by the House, it was time now to stop it as such power would be dangerous in the extreme.[3]

In answer to the argument that a warrant could not be issued by the House unless on oath, it was stated that the character of the House must be sunk to a low ebb, if the representations of its members were not to be received as true.[4] Precedents were cited to show that the House had acted in a similar manner in previous cases.[5] It was claimed that the House had the same power to punish for contempt that the court had and for the same reason, viz. to maintain its security and purity. And, finally, with respect to this point it was held by the proponents of the resolution that the 4th Amendment limiting the power to issue warrants referred only to courts of justice and could not be con-

[1] 15th Cong., 1st sess., vol. i, *Annals*, p. 594.

[2] *Ibid.*, p. 594.

[3] *Ibid.*, p. 606.

[4] *Ibid.*, p. 596.

[5] *Ibid.*, p. 599. See Cases of Randall and Whitney.

strued to apply to warrants of the description now under consideration.[1]

It was finally pointed out to the House that the question before them was the proposed resolution and that nothing was gained by debating the general powers of the House to punish for contempt.[2] The resolution was agreed to and a committee appointed.

After a few hours' deliberation, the committee made its report, recommending the following resolution for adoption: Resolved,

That John Anderson be brought before the House, and interrogated by the Speaker, on written interrogatories, touching the matter of writing and delivering a letter to a member of the House, offering him a bribe, which with his answer thereto, shall be entered on the minutes of the House. And that every question proposed by a member be reduced to writing, and a motion made that the same be put by the Speaker, and the question and answer shall be entered on the minutes of the House. That after such interrogatories are answered, if the House deem it necessary to make further inquiry on the subject, the same be conducted by a committee to be appointed for that purpose.

Objection was made that the adoption of such a measure would lead to a novel procedure for,

the man was to be brought to the bar to be interrogated, for what? To criminate himself? If he speaks the truth, he must criminate himself. Was this House to be converted into an inquisitorial court? Such proceedings were adverse to the right of the accused, to the proceedings in other courts, and contrary to the principle of the Constitution, that no person shall be compelled, in any criminal case, to be a witness against himself.[3]

[1] 15th Cong., 1st sess., vol. i, *Annals*, p. 603.

[2] *Idem.*

[3] *Ibid.*, p. 607.

The protest was of no avail and the report was adopted. The said Anderson then appeared at the bar of the House, in the custody of the Sergeant at Arms. He was addressed by the Speaker who informed him that he could have counsel in his defense, also witnesses. He answered that he was a stranger here, that he desired the assistance of counsel and compulsory process to obtain the attendance of witnesses in his favor. The House did not exactly agree with the Speaker that the House comply with the requests of the witness. The Speaker thereon addressed Anderson as follows:

John Anderson, I am directed to inform you that, pursuant to your request, you are at liberty to engage such counsel as you may think fit, that the clerk of the House will furnish you with such subpoenas for witnesses as you may think proper, and that you will also be furnished with a copy of the letter on which the proceedings are founded, and of the statement of an honorable member of this House which accompanies it.[1]

At this juncture in the proceedings Mr. Spencer of New York introduced a very significant resolution in that it fully portrayed the attitude of the opposition to the whole proceedings. It read as follows:

The House of Representatives, entertaining great doubts of its possessing the competent power to punish John Anderson for his contempt of the House, and his outrage upon one of its members;

Resolved, That all further proceedings in this House against the said John Anderson cease, and that he be discharged from the custody of the Sergeant at Arms;

Resolved, That the Committee on the Judiciary be instructed to inquire into the expediency of providing by law for the punishment of any contempt of the Senate or House of Repre-

[1] 15th Cong., 1st sess., vol. i, *Annals*, p. 608.

sentatives of the United States and of any breach of the privileges of either House;

Resolved, That the Attorney General of the United States be directed to institute such proceedings against John Anderson as may be agreeable to the laws of the United States and of the District of Columbia.[1]

The submission of this proposal to Congress provoked a lengthy debate which brought every phase of the Congressional power to punish for contempt and breach of privilege up for argument.[2]

In offering this resolution to the House, Mr. Spencer observed that the contemplated proceedings were unconstitutional, illegal and void as being contrary to the 4th, 5th and 6th Amendments to the Constitution. He claimed that there was nothing in the Constitution mentioning power to punish for contempts and that the power was not necessary and inherent in a legislative body. As to basing this power on precedents of the Parliament of Great Britain he said:

With regard to the law of Parliament, in England, it is a peculiar branch of the common law, declared by the two Houses from time to time. That law is not recognized in the United States Government or courts, except so far as it has been expressly adopted. I utterly disclaim and deny therefore the authority of Parliament as applicable to Congress. . . . If we borrow from England the doctrine of privilege, why may not any future executive loan for a short time that of prerogative? One step more, create a star chamber judiciary to sanction and enforce your claims, and we shall have reached the goal of our course.[3]

Other members supporting the resolution held that

no act, however offensive can be construed into a contempt of

[1] 15th Cong., 1st sess., vol. i, *Annals*, p. 612.

[2] *Ibid.*, pp. 611-775.

[3] *Ibid.*, pp. 614, 615, 618.

this body, which does not directly interfere with and disturb its deliberations while in session, or disable some one of its members, so that he cannot discharge the trust reposed in him by his constituents.[1] Are we about to deprive this unfortunate man of the sacred rights found in the Constitution, especially in the first ten amendments, to immolate them on the altar of Congressional privileges, and thereby establish a precedent which may drag to the bar of some future Congress the most respectable citizen in the Union, who may become offensive to one of its members? . . . And in addition to all this, when you are asked to designate the law which the accused has violated, you refer him to the common law of England, to the law of Parliament, under the head of privileges; and for your power, to reason and common sense.

In summing up the argument for the last resolution mentioned above, one of its proponents asked:

If the doctrine contended for be correct, that the House of Representatives have the power, at their discretion, to imprison a citizen for what they may suppose to be a rude questioning of a member, for what he has said in debate, permit me to ask, where would be the liberty of the press, and where would be the liberty of the investigation? It must be answered, in the close custody and keeping of this House. Is such the much loved and boasted theory of our free institutions? . . . But if the citizen, in thus questioning the conduct and character of a representative, does maliciously and falsely defame his reputation, the representative, as a man, has a legal remedy, by an action at law, to be prosecuted in the courts of judicature, not in this House.[2] If this House proceed to make the law, accuse and condemn for the breach of it, and to execute such judgment by imprisoning the offender, such a course would be the combining and exercising the powers of the three departments by the one, which is the consummation of tyranny.[3] . . . Contempts, as

[1] 15th Cong., 1st sess., vol. i, *Annals*, p. 654.

[2] *Ibid.*, p. 766.

[3] *Ibid.*, p. 767.

embraced by the law are crimes, and are properly cognizable, only within the judicial department of the Government.

It was claimed further that the existence of such power in the judiciary is " far less to be dreaded than in this House, as the abuse of it at any time may be corrected by the legislative power, in limiting or defining it, or by divesting the courts of the power entirely. But where is to be found the power to constrain, control, or limit the abuse of it here? "

Mr. Forsyth lead the debate against the resolutions submitted by Mr. Spencer of New York. In rebutting Mr. Spencer's arguments, he said that he did not believe those clauses of the Constitution, viz. the 4th, 5th and 6th Amendments, applicable to the present case.

The person in custody is charged with a contempt, punished summarily in all cases—not for an offense indictable and punishable by the ordinary course of judicial proceedings. Every gentleman, whether of the profession of the law or not, will know the distinction, and that these clauses of the Constitution were framed without any view to the exercise of this power to punish contempts, and without any intention to prevent its exercise.

He mentioned the precedents established in the case of Randall and Whitney, the precedents of Parliament, the state legislatures and the courts. The precedent established in Randall's case was based on the inherent right of the House to do all acts necessary to the due exercise of the trust reposed in them, said Mr. Forsyth. This was the foundation on which, in this particular case, the power of the House was vested. There was a certain class of powers, he observed, every day exercised by this House, somewhat analogous to that which was the subject of debate. Whence was derived the power, which was frequently exercised by this House, and even frequently conferred on its subordinate committees, of

sending for persons and papers? Did anyone doubt the right of the House to do this? Was the right which was every day's practice doubted? This power exists from necessity. How could the House ascertain the guilt or innocence of a public offender, whose conduct should be arraigned before it, without this power? It was essentially necessary that it should have it, to compel the attendance of witnesses, and the production of papers in their possession. That power had therefore been, and always must be, exercised without dispute, though there was nothing in the Constitution, conferring that power on the House. The power arose by necessary implication from the duty imposed upon the House of examining into the conduct of the offices of the government.[1]

Mr. Mercer of Virginia claimed the House had the power to punish contempts based on the common law. He said:

It is to this system viz. common law, that I resort for the authority of this House to punish a contempt; to define the act to be punished; to determine the mode of proceeding against the accused; and if guilty, to ascertain the quality, and measure the extent of his punishment. And I do so, not because the common law confers these powers on this House, but because it defines that written Constitution, from which we derive them. . . . That Constitution which confers on the representatives of the nation the power of legislation, and denominates this body a House of Representatives, clothes it with the common attributes appertaining to its office and title.

He denied that the enumeration of certain privileges in the Constitution excluded the constitutional exercise of others, and said:

The Constitution which had sought to enumerate these, must have been satisfied with general terms of vague significance, or proceeded to an enumeration of particulars which no Constitution ever did attempt to embrace. If it is admitted that the

[1] 15th Cong., 1st sess., *Annals*, pp. 622, 623, 624.

House has power to punish contempts committed against its peace and dignity within this Hall; then the object of the proposed enumeration totally fails, and with it this pretended limitation to the authority of the House to punish contempts, wherever they may be committed.

As to whether the House had proceeded legally in Anderson's case in arresting him, Mr. Mercer stated

that the warrant for the arrest was not a general warrant. It describes the prisoner by name. But it has been urged by more apparent force, that it is unsustained by any oath or affirmation, and therefore is in violation of the 4th Article to the Constitution, which provides that no warrant shall issue but upon probable cause, supported by such evidence. The Constitution certainly supposes the judge who issues the warrant, not to be himself personally cognizant of the fact on which it is grounded. He may issue a warrant, "on probable cause, supported by oath". It is certain that conviction of the truth of the fact must supersede the necessity of any oath, to say nothing of the absurdity to which such a doctrine might lead.[1]

Mr. Holmes of Massachusetts was another staunch supporter of the power of the House to punish contempts of the sort emphasized in this case. He said:

I do not insist so much on the common law's giving this right. It is a right essential and inherent in every legislative body, that it shall protect itself. If no precedent existed, if the Constitution, the rules, and laws were silent, I would contend for this right of self preservation. The framers of the Constitution were acquainted with legislative assemblies and their rights. The rules of the House of Commons and of the colonial and state legislatures were familiar to them. Had they entertained a doubt of the right in every legislative body to protect itself against violence and corruption, they would have provided for its security. We are invested with authority to legislate for the people. To us is committed the protection of their lives,

[1] 15th Cong., 1st sess., *Annals*, pp. 638, 639.

liberties and property. How are we to perform these duties if we have no power to defend ourselves against insult? [1]

Mr. Holmes was strongly supported by Mr. Pindall of Virginia, who observed that the House possesses an inherent power to preserve its own privileges, a power inseparable from the power of legislation granted by the Constitution. He pointed out that this power derogates not from the rights of the States or of the people, but is derived from those rights. "It is by the command or grant of the States and the people we exercise the powers confided by the Constitution; and inasmuch as they intend we should, at all hazard, execute those powers, they must, of necessity, have intended, that we should suppress all obstructions to their due exercise. The House of Representatives derives its privileges from a just interpretation of the Constitution, and asks no aid from precedents, when claiming merely a power essential to the exercise of its duties. I am opposed to the granting of leave to bring in a bill to punish breaches of privileges, because we already possess the power to punish, derived from a higher source. If a power cannot be implied (to defend our privilege) from the Constitution, we cannot pass a law to enable ourselves to assume such a power." [2]

Mr. McLane of Delaware said he was greatly surprised to hear Mr. Spencer of New York say that a man could not be twice tried for the same offense; and that therefore, as John Anderson may be tried for bribery, he is not liable to be proceeded against in any other manner.

There is nothing more fallacious than this mode of reasoning; for although it may be conceded that a man cannot be twice punished for the same offense, yet it is perfectly clear that the same act may comprehend within it two, or even more offenses, each

[1] 15th Cong., 1st sess., *Annals*, p. 663.

[2] *Ibid.*, p. 674.

of which is liable to distinct remedies and different punishments, and very frequently before separate tribunals. If the power of the House to punish for a contempt is conceded, as I apprehend it is, the exercise of that power must always be a matter of sound discretion, to be determined by the House, in reference to the particular case. What does, or does not amount to a contempt, will always be a proper subject of deliberation; and it is certainly not difficult to imagine many cases in which it would, no doubt, be improper for the House to exercise it, but to remove the exercise of the power in one case, it is not necessary to show that it possesses it in all cases, if it possesses it in a case proper for its interference, it is enough. Gentlemen say that this House has no power to punish for a contempt, because it is not given by the Constitution, then surely sir, the power to pass a law for that purpose is not given. Here indeed, a case might be made to meet the Constitutional objection, the objects of our legislative power being limited; we could exercise no others. But, sir, the power being incidental, it must exist without the law, and could not be varied by any act of legislation which could be passed. It is a power founded on the eternal principles of self-preservation and self-protection, and no law could either enlarge or diminish its extent.[1]

With reference to the fact that the warrant was issued in this case without an oath, Mr. McLane said:

The provision in the Constitution, upon which this objection is founded, can have no reference to a case of this description, it relates to the case of an arrest, upon the information of a person, upon the suspicion of a crime, for which the party is to undergo a trial by jury, and the oath is required in aid of probable cause only; it is designed to prevent justices from issuing warrants upon slight grounds, or where there does not exist substantial proof that the party is liable to arrest. But whenever the proof is plenary, either in the knowledge of the party issuing the warrant or from the facts indubitable, an oath is not

[1] 15th Cong., 1st sess., *Annals*, pp. 691, 692.

necessary. . . . Nothing is more common than to arrest individuals under process, in civil suits, without oath; and it is done upon the principle that the constitutional provision relates exclusively to the cases of crimes or offenses against the Republic.

The arguments given above were enforced by the speech of Mr. Smyth of Virginia. He also held that the 5th and 6th Amendments to the Constitution had no relation to this case,

which is a proceeding against the prisoner for contempt. All the courts in all the States punish persons for contempts, by fine and imprisonment, at discretion without oath; such proceedings are by no means to be regarded as criminal prosecutions within the meaning of the amendments to the Constitution. The House of Representatives possesses the same power to punish contempts that the British House of Commons does, and for the same reason, not because it is the common law of England, but because reason, the basis of the common law, that gave this power to the House of Commons, as incidental to their legislative power, gives it also to this House.[1]

Mr. Settle of North Carolina reminded the House that "this House cannot for any offense, under the circumstances, inflict greater punishment than imprisonment during the session."

Mr. Talmadge of New York, while "disclaiming to hold this power under the Constitution or the common law," said:

I do maintain that this House possesses the power as incidental to its existence, and an inseparable attendant upon its formation and a necessary consequence. It has been said that the Constitution provides, "That the trial of all crimes, except impeachment, shall be by jury" and that the exercise of power by this House is therefore prevented. In like manner does the

[1] 15th Cong., 1st sess., *Annals*, p. 713.

Magna Charta provide, That no man shall be taken or imprisoned except by the legal judgment of his peers, or the law of the land. And yet the Parliament of Great Britain, and all their courts of justice, have constantly proceeded, by attachment and summary process, to prevent all interruptions, and to remove all obstruction in the course of their business; to enforce their orders, and to punish for contempts of their authority.[1]

He further stated:

This power must be summary, from its nature it is to be applied to the circumstances; and it must be discretionary; and the offenses to which this power is to be applied do not come within that class of crimes contemplated by the Constitution, and for which is guaranteed the trial by jury. This case is at least one of conflicting rights, if the prisoner has rights, so has this House; whose rights are violated is the question.[2]

Mr. Hopkinson of Pennsylvania also supported the proceedings of the House to this point. He observed that there was no agreement among the opposition as to just what portion of the Constitution prohibited the action of the House.

One finds it in certain provisions which he asserts to be clear and conclusive, another infers it from certain given powers, which are alleged to be exclusive of all others, and a third class deduces it from the nature and spirit of our government. Now sir, it is not unfair to say that a prohibition so difficult to be fixed in any part of the Constitution, really exists in no part of it, and we need not fear to violate an instrument which takes so little care of itself in this respect.[3]

He mentioned the case of Randall and Whitney also, stating that warrants were issued on the representation of facts made

[1] 15th Cong., 1st sess., *Annals*, pp. 713, 714.

[2] *Ibid.*, pp. 715, 719.

[3] *Ibid.*, p. 723.

by members in their places, and it never was required that they should verify their representations by oath. He cited a mass of precedent including examples from the English Parliament, state legislatures and colonial assemblies which he said

> proved beyond all question that by a sort of universal consent, it has been conceded and understood that every body, created either to make or administer the laws of the country, must have a power within itself, and independent of other tribunals of justice, to protect itself from violence, from insult, from everything and everybody that would interrupt or corrupt its proceedings.[1]

The constitutional barrier to arbitrary exercise of this power, he thought,

> was precisely where we would place it . . . in the necessity of the case, fairly and discreetly judged of and decided by the body offended, governing itself by established principles and precedents.[2] What this power was, and how it had been exercised, were well known to the Convention, and doubtless intended to be assumed by Congress, on the same principles and used in the same manner as other legislative judicial bodies had used them.[3] Why [he said] if you claim this is too extensive a power of Congress, does not this House assume powers, and high and important powers, on the same authority and without any express grant of them in the Constitution? Do you not take to yourselves, and even impart to your committees the power of sending to the extreme limits of the Union for persons and papers, whenever it is deemed necessary for the public good? What power can be more absolute, more inconvenient to the citizen, or a bolder intrusion upon his person and privacy? Yet we find it not in the Constitution, and justify it only as an

[1] 15th Cong., 1st sess., *Annals*, p. 729.

[2] *Ibid.*, p. 731.

[3] *Ibid.*, p. 734.

incidental power arising from necessity, and sanctioned by the usage of similar bodies.[1]

Mr. Whitman of Massachusetts noted that the proceeding by attachment is authorized by the principles of the common law. "It is sanctioned by usage, by the practice of all tribunals of justice, and all legislative bodies." [2]

Several motions were made in the House to postpone action in Anderson's case but they were all defeated. Finally on January 15, Mr. Tallmadge offered the following resolution for consideration: "Resolved, That John Anderson be forthwith brought to the bar of this House." It was adopted by a vote of 118-45. The Sergeant at Arms then brought the prisoner to the bar, and the Speaker questioned him, after which the prisoner then called upon his witnesses, eleven in all; who being previously sworn, delivered their testimony. The testimony was uniform, as far as the knowledge of the witnesses extended, in giving the accused a high character for probity, correct deportment and patriotic conduct.[3]

During the course of the trial, one of the witnesses was about to testify on matters somewhat ancillary to the discussion at hand, which might have had the effect of damaging the character of parties outside the case. Some of the members objected vigorously to such testimony, claiming it had nothing to do with Anderson's case. He was not allowed to continue his testimony, but a special committee was appointed to investigate the lead he had already given the House.[4]

After Anderson had been questioned, and his witnesses had testified, and he had made a statement, the will of the

[1] 15th Cong., 1st sess., *Annals*, p. 734.

[2] *Ibid.*, p. 740.

[3] *Ibid.*, p. 778.

[4] *Ibid.*, pp. 780-783.

House was finally consummated in his case by the passage of the following resolution: Resolved,

That John Anderson has been guilty of a contempt and a violation of the privileges of the House, and that he be brought to the bar of the House this day, and be there reprimanded by the Speaker for the outrage he has committed, and then discharged from the custody of the Sergeant at Arms.[1]

Whereupon the prisoner was severely reprimanded by the Speaker and released from custody.[2]

A study of the main arguments brought out in the debates in this case indicates very clearly the existence of two opposing groups in Congress with respect to the exercise of the power to punish for contempts and issue compulsory process. On the one hand were the strict constructionists condemning the exercise of such power by Congress: (1) Because it was unconstitutional, being contrary to the 1st, 4th, 5th and 6th Amendments to the Constitution, and because the Constitution specifically mentioned the privileges of Congress, it could punish for these but no others. (2) They denied the force of precedent, believing that the previous examples of the exercise of such power by the British Parliament, the state legislatures and even Congress had no effect in this case. (3) They refuted the claim that the exercise of this power was necessary to the existence of the House, for they said an effective and better method of punishment can occur by way of prosecution in the courts. They believed such an exercise of power by Congress would deprive citizens of the liberty of the press, of speech and of investigation of Congress. (4) They held that when the House acted in this manner it combined the three governments in one which they claimed was the consummation of tyranny. (5) Finally they

[1] 15th Cong., 1st sess., *Annals*, p. 789.

[2] *Ibid.*, p. 790.

stated that if Congress was going to use such power, it should pass a law defining contempts and the degree of punishment.

On the other side were the loose constructionists, maintaining that such power was inherent and natural to every legislative body, that its proceedings in such cases should not be hampered by the rules prevailing in the courts and that the Congress of the United States was not hampered by the 1st, 4th, 5th and 6th Amendments to the Federal Constitution, as these applied only to criminal cases in the courts. This group believed that force of precedent and common law sanctioned the exercise of such power and even the Constitution approved it by its very silence. To answer the argument that if Congress was going to punish for contempts, it should enact a statute defining them, the proponents of this power asked how Congress could enact a law defining contempts if there was no such authority to punish given in the Constitution. In other words this appeared to them as a concession that Congress did have the power.

It should be remembered that Congress had passed no law referring to the issuance of compulsory process, or contempts, in fact the only statute having any relation to the exercise of such power being the one of 1798.[1] Moreover, there was nothing specific in the Constitution giving either House power to punish for contempt. It is true that precedent favored the exercise of such power and in the debates this seemed to be the favorite argument supporting the exercise of this power.

A study of the questions asked Anderson and his replies, together with the testimony of his witnesses, leaves one with the impression that Congress was bound to make a case against him and imitate the precedent established in Great Britain in similar cases. It would have been a better course

[1] See *infra*, ch. v, p. 300.

to have punished Anderson by a prosecution at law. At least it would have saved the time Congress took in debating this case. The argument of the opposition that to allow Congress to define what constituted a contempt in each case where such a contempt arose was very dangerous to the personal liberty of the citizen, certainly had some weight to it. However two-thirds of the House favored the exercise of such power, and it is interesting to note that the great bulk of this group came from the New England and Middle Atlantic States, including Virginia, which had the largest single group favoring the proceedings. The opposition came mostly from the Southern States, although it was a southern member of the House, who had been approached by Anderson.

The proceedings in Anderson's case are significant not only as indicating the attitude of Congress with respect to the exercise of power to punish for contempt, but also because out of these proceedings there developed the first decision of the Supreme Court of the United States as to the power of the House of Representatives to take cognizance of contempts committed against that body under any circumstances; for it seems that after Anderson was released from custody, he sued Thomas Dunn, Sergeant at Arms, for assault and battery and false imprisonment.[1]

This case then confirmed the precedents established in Randall's, Whitney's and Duane's case, that the Houses of Congress could issue warrants without oaths, that their proceedings in trials for contempt would be governed by their own discretion and were not subject to the same rules as judicial proceedings and that libel or bribery in case of either the House or the Senate might be considered as a contempt, and could be punished by imprisonment for a period not exceeding the term of the session, and finally that either House

[1] Anderson *v.* Dunn, 6 Wheaton, p. 204 (1821).

of Congress had the power to authorize compulsory investigations of charges in cases of this sort and thus could summon witnesses and punish them in case of contempt.

During 1820 and 1822 the Post Office Department was subjected to several investigations by the House. On December 19, 1820 the House adopted a resolution for the appointment of a committee "to investigate the affairs of the Post Office, with power to send for persons and papers." [1] Its report showed that a searching investigation had been made into the accounting affairs of this Department.[2] Again on February 14, 1822 a committee was appointed to investigate the "affairs of the Post Office Department, with power to send for persons and papers." [3]

In 1824 the House investigated on application of the United States Minister, Mr. Edwards, a controversy between him and the Secretary of the Treasury.[4] Edwards accused the Secretary of mismanagement of public funds and with the suppression of papers and documents which should have been communicated to Congress in answer to their resolutions. His complaint was referred to a select committee with power to send for persons and papers. Immediately upon their appointment the committee communicated a copy of Mr. Edwards' complaint to the Secretary of the Treasury, and also requested the attendance of Mr. Edwards.[5] The Secretary of the Treasury, Mr. W. H. Crawford, did not appear personally, but answered the charges against him in writing, stating, however, that if the committee wanted him to appear, he would do so.

As the House was about to adjourn before the Committee

[1] 16th Cong., 2d sess., *Journal of the House,* p. 80.

[2] 16th Cong., 2d sess., *Annals,* pp. 1251-52.

[3] 17th Cong., 1st sess, *Annals,* p. 1034.

[4] 18th Cong., 1st sess., *Annals,* p. 2431.

[5] *Ibid., Annals,* pp. 2713, 2761, 2766.

could complete its investigation, they recommended that they be allowed to sit in the recess after the adjournment of the session, in order to complete their work. Their request was granted, the House adopting the following order: Ordered

That the Committee to which was referred the address of Edwards, be required to sit after the adjournment of the House for such time as shall be necessary in their judgment for further examination; that any additional report which may be made by them be filed in the office of the Clerk of the House, which report shall be, by him, printed and forwarded to members of Congress.

A further order, passed the next day, empowered the Clerk to pay witnesses and the expense of sub-poenaing them, on certificate of the Chairman.

A study of the final report of the Chairman [1] indicates that Mr. Edwards attended the Committee in obedience to summons, was examined as a witness, (under oath) and was cross examined by a gentleman attending on behalf of the Secretary of the Treasury. Among those summoned were several Senators and members of the House. During the examination before the Committee the Secretary of the Treasury was permitted to be represented by counsel and to summon witnesses in his own behalf.

The Committee expressed the opinion that nothing had been proved to impeach the integrity of the Secretary, but beyond that statement, contented themselves with presenting the facts and the testimony.

In 1825 President Monroe asked the House to examine and investigate his accounts in the same manner as the claims or accounts of any other individual.[2] An argument followed as to whether this was a proper procedure. Mr.

[1] 18th Cong., 1st sess., *Annals*, p. 2770.

[2] 18th Cong., 2d sess., 1 *Cong. Debates*, p. 170.

Mangum of North Carolina observed that this appeared to be one of the strangest applications that was ever made to Congress. He asked the object to be accomplished by the proposed investigation. "Was this House to be erected into a tribunal for the trial of questions of honor?" It was with pleasure he believed that this investigation was utterly unnecesary to repel aspersions or ward off attacks upon the chief magistrate.

Advocates of the investigation stated:

> A well tried and a faithful public servant, who for eight years has occupied the most distinguished station in this country, thinks it necessary for his reputation to ask of you a general investigation into all his pecuniary transactions with the government. He considers that his character in this particular has been unjustly assailed and, about to retire from office, he wishes it to be placed beyond suspicion before the world. For this purpose he has requested of us to inquire into his public conduct, so far as it regards his accounts before the Government. Can we, upon any just principle, refuse this request? Certainly not. He has a right to demand it.

There was some argument as to whether this investigation should be referred to the Standing Committee on Claims, or to a select committee. Some thought reference to any committee might lead to corruption as quite often members of the House were applicants to the President for office. In fact, it was believed by some of the members that conducting the investigation in any manner might lead to corruption between the President and the House, and that if such an investigation had to be made, it should be conducted by the Supreme Court, a Controller, Auditor or any other tribunal than the House. This argument was dismissed without consideration and vote taken on the question to refer the investigation to a select committee. It was approved with an amendment to the original question instructing the com-

mittee appointed as follows: "To receive from the President any evidences or explanations of his claims which he may think proper to present, and to file the same in the office of the clerk of the House, to be acted upon in the next session of Congress."

In the same year the House of Representatives requested President Monroe to transmit certain documents relating to the conduct of certain officers of the United States Navy. The documents were refused on the ground that it was due the individuals under criticism and the character of the government that they should not be censured without just cause, which could not be ascertained until after a thorough and impartial investigation.[1]

In 1826 the precedent set by Wolcott in 1800 and Monroe in 1825 was followed by Vice President Calhoun.[2] On December 29, 1826 the Speaker laid before the House the following communication from the Vice President of the United States addressed to the Honorable members of the House of Representatives.

An imperious sense of duty and a sacred regard to the honor of the station which I occupy compel me to approach your body, in its high character of grand inquest of the nation. . . . In claiming the investigation of the House, I am sensible that under our free and happy institutions the conduct of public servants is a fair subject of the closest scrutiny; . . . but when such attacks assume the character of impeachable offenses and become in some degree official by being placed among the public records, an officer thus assailed, however base the instrument used, if conscious of innocence, can look for refuge only to the Hall of the immediate representatives of the people.

It seems that charges had been filed in an executive depart-

[1] Cited in *Cong. Record*, 69th Cong., 1st sess., p. 4548.

[2] 19th Cong., 2d sess., Dec. 29, 1826, *Debates*, pp. 574, 576.

ment that he had, while Secretary of War, corruptly participated in the profits of a public contract. Hence he challenged the freest investigation by the House. The communication was referred to a select committee with power to send for persons and papers. On February 13, 1827 Mr. Wright, second member of the committee, from Ohio, made a report which was read and laid on the table.[1] The report states that immediately after the committee assembled, they informed the Vice President that they were ready to receive any communication which he might see fit to make. On the receipt of his reply, Mr. McDuffie, a friend and representative of the Vice President, was admitted before the committee, and attended through the examination which followed.

The report reviews the charges and testimony, giving the conclusions of the committee, and also transmits the testimony and a written protest of Mr. Mc Duffie against the methods by which the committee had proceeded.[2] His main complaint was against what he considered the departure of the committee " from the fundamental principles of judicial investigation and the established rules of judicial evidence." He said:

I should be equally insensible to the claims of private friendship, and the obligation of public duty were I not to enter my solemn protest against the extraordinary course, and not less extraordinary conclusion, of a proceeding, singularly destitute of almost every attribute of a legal investigation. Even if it should be considered that this committee was instituted not for the purpose of sitting in judgment on the specific charge submitted to their examination, but for the additional purpose of exercising, to a certain extent, the functions of an inquisitorial commission, I cannot conceive that there would be anything in the character of such a commission, that would authorize its depar-

[1] 19th Cong., 2d sess., Feb. 13, 1827, *Debates*, p. 1123.

[2] *Ibid.*, pp. 1123-1135.

ture from the fundamental principles of judicial investigation . . . and after wandering at large through the perplexing mass of suspicion and conjecture, guided only by the bewildering lights of incompetent and inadmissible testimony, to select the precise point where suspicion ends and legal evidence begins, as the conclusion of their inquiries.[1]

Mr. McDuffie also protested against hearsay evidence saying:

Admitting that it is proper for the committee to assume inquisitorial powers in this investigation and in that character to ask of the witnesses not only what they know but what they have heard from others, it must be exceedingly apparent that the only excusable purpose, even of an inquisitorial kind, for which such questions could be propounded, is the discovery of other witnesses, by whose evidence the charges might be established.[2]

The report also shows that at the request of Mr. McDuffie, subpoenas were issued for witnesses to testify in behalf of the Vice President.[3]

The conclusions of the committee as to the subject of the investigation were as follows:

From the nature of the duties imposed upon a committee of inquiry, especially when connected with a distinct wish, as expressed by the Vice President, in the present instance, for the "freest investigation" it has been impossible for the committee to give to their proceedings the connexion and conciseness incident to trials, when the testimony is ascertained and arranged before it is presented. They have diligently applied themselves to the subject referred to them, and after a long and laborious examination, they are unanimously of the opinion, that there are no facts which will authorize the belief, or even suspicion, that

[1] 19th Cong., 2d sess., Feb. 13, 1827, *Debates*, p. 1127.

[2] *Ibid.*, p. 1130.

[3] *Ibid.*, p. 1124.

the Vice President was ever interested, directly or indirectly, in the profits of any contract formed with the Government through the Department of War, while he was intrusted with the discharge of its duties, or at any other time.[1]

The report proposed no action by the House, therefore the House disposed of it by ordering that it be laid on the table and be printed, with the accompanying documents, and the views of the minority of the committee which were submitted as a separate report.[2]

After this was done, Mr. Van Deventer, who was Chief Clerk of the War Department, considered that the testimony presented by the committee contained reflections on his conduct, and therefore he wished his explanation to accompany those reflections. A debate ensued on his petition which was presented to the House. Mr. Wright stated that the committee had received several such communications; but they did not consider them pertinent to the inquiry committed to them and hence had returned them to the senders. The committee did not see why they should enter upon investigation to exculpate these individuals any more than all other witnesses. They could not be diverted from the main object of inquiry by unnecessary investigations. To append documents and arguments to the report of the committee for the purpose of exculpating a witness would be a novel procedure, leading to many perplexities.[3]

Mr. Forsyth, who presented the petition to the House, pointed out, on the other hand, that this man was a public officer who was about to be injured by the publication in a report of a matter reflecting on his character.[4] The answer was:

[1] 19th Cong., 2d sess., Feb. 13, 1827, *Debates*, pp. 1123, 1124.

[2] *Ibid.*, p. 1143.

[3] *Ibid.*, p. 1144.

[4] *Ibid.*, p. 1145.

But even admitting, for argument's sake, that Mr. Van Deventer is an officer of the Government, and that charges are preferred against him (which is not true) what is the course which it becomes him to pursue? To apply to this house, to specify the charges brought against him, and to ask the House to investigate their truth.[1]

The House without division, decided not to print the communication with the report, but laid it on the table.[2]

The examples of the exercise of the inquisitorial power by Congress studied so far have related either to proceedings and investigations concerning the conduct of public officials and the administration of the law or cases involving either the enumerated or implied privileges of the House. The cases of privileges based upon an implication of power were those pertaining to libel and bribery. The exercise of power to punish for contempt and the use of inquisitorial power in these cases could be easily allowed, as it was obvious that such acts, when flagrant, were a direct interference with the proper discharge of legislative duties. The problem was where to draw the line as to what constituted an invasion of the implied privileges of either House where such acts were concerned. For example, in the Duane case we note the Senate taking violent objection to his newspaper publication because he published misinformation concerning the progress of a bill through the Senate. Direct defamation of character, of course, should constitute libel, although even here the decision as to whether the offense was serious enough to constitute a contempt of the legislature might very easily turn on the momentary passion of the house affected.

In the cases already considered, it will be noted that strenuous objections were raised not only to the Houses of Congress taking cognizance of such acts and punishing for them,

[1] 19th Cong., 2d sess., Feb. 13, 1827, *Debates*, p. 1150.

[2] *Ibid.*

but also to the mode of proceedings adopted in the individual cases for the acquisition of testimony and the trial of the person complained of.

Investigations of the executive departments began with the first administration, and were at times strenuously opposed by the executive, mainly because they conflicted with the doctrine of separation of powers. On the other hand, executive officials frequently asked for such investigations and admitted the power of the Houses of Congress in the premises.

In 1827 Congress set the precedent of summoning witnesses for the purpose of acquiring information to aid in the making of legislation. On December 31, in that year, Mr. R. C. Mallary of Vermont, by direction of the Committee on Manufactures, submitted the following resolution: "Resolved, That the Committee on Manufactures be vested with the power to send for persons and papers." Mr. Thomas J. Oakley of New York proposed an amendment striking out the words " vested with power and authority to send for persons and papers" and inserting the following: "empowered to send for and examine persons on oath, concerning the present condition of our manufactures, and to report the minutes of such examination to this House." [1] A lengthy and acrimonious debate developed over this proposition. It was generally agreed that a demand for like powers had never before been made in Congress by a committee whose duties were similar to that of the Committee on Manufactures. Propositions for a grant of power to a committee to send for persons and papers had hitherto been confined to what was termed in the debates, " the exercise of the judicial power of the House."

Those favoring the adoption of the resolution claimed it was necessary because the committee found many conflicting memorials before them, and that the truth could not be

[1] 20th Cong., 1st sess., 4 *Cong. Debates*, p. 862.

arrived at by oral testimony. It seems that most of their testimony had been received in the form of written statements from interested persons. The strongest speech in favor of the resolution was made by Mr. Livingston of Louisiana. He said:

Shall we reverse the rule of business in this House, and, instead of employing a committee to state facts, and give us their deductions from them, shall we oblige them to bring in a bill without any knowledge of the subject, and supply the gross deficiency with our superior knowledge? But before we take this course, it is worth inquiry whether we ourselves possess this knowledge, and to what extent? We will take this from the gentlemen who oppose the resolution, if any member in this House possess the information. They have it, and they have not left us in doubt as to the kind of evidence on which they rest their belief. What more, say those gentlemen, can be desired? Have we not memorials from all the manufacturers? Do not our tables groan with the weight of their complaints? What more can be desired? Something more in my opinion; and if this is the best evidence—and it must be supposed to be such, for it has been relied on by all who spoke against the resolution—it is the strongest argument that could be used in favor of the measure proposed. I will believe that many of these memorialists are very respectable people; but are they disinterested? . . . A long professional practice has taught me the danger of relying on the testimony of interested witnesses, and has also shown me the great utility of cross examination. From disinterested witnesses it is calculated to elicit truth; but it is invaluable for the detection of all those subterfuges to which interest resorts, in order to hide the truth, or give a false color to a true statement.[1]

Others stated that the acquisition of evidence by oral testimony had been a course pursued by the House of Commons. They believed that the power asked for was not dangerous, for the subject deeply affected the interests of the people and

[1] 20th Cong., 1st sess., *Debates*, p. 871.

it was proposed merely to compel the attendance of witnesses, a power exercised in the most insignificant cases of litigation between persons. The viva voce examination was much more satisfactory than the written memorials. The common law of Parliament should dictate that the legislature must possess the power requisite to procure the information needed in order to act understandingly. And in fact it seemed true that committees already had the power to examine under oath, the statutes conferring on the Chairmen the power to administer oaths.[1]

In opposition it was argued that no one could cite a case in the House of Representatives where a demand for like powers had been made by a committee having duties similar to those of the Committee on Manufactures. The power to send for persons and papers had hitherto been exercised by committees having judicial functions and exercising the judicial power of the House. Mr. Wood of New York in opposing the resolution said:

If the Committee sends for a person, it must send a warrant, or a subpoena, and the individual sent for, must come, and must answer. If not, you commit him for a contempt, and when he has come, and stands before your committee, what are the rules to govern the committee in their examination? Courts have rules to restrain them. A committee has none. They are left to their mere discretion, and the individual must bring all his books and papers if required. Sir, this is an inquisition, which every court of law abhors. It is odious, and oppressive, in the highest degree, and I, for one, will never consent to it.[2]

Mr. Strong, also of New York, asked the following:

But if this enormous power of sending for persons and papers be given to the committee, what will be the progress of its execution? Will the committee confine its exercise to the District

[1] See *infra*, ch. v, p. 300.

[2] 20th Cong., 1st sess., *Debates*, p. 883.

of Columbia? No. . . . Can they perform their duty without collecting all the facts within the scope of this power, from Machias to the Gulf of Mexico? . . . What is the nature of the power proposed to be given to this committee? If it is to send out the Sergeant at Arms, clothed with all the power of this House, to summon persons in any and every part of the Nation, and to compel their attendance here, in this Capitol, there is no dispensing power. Whoever is summoned, whether he live in Maine or Louisiana must come, or be guilty of a contempt of the authority of this House. And for what purpose is this fearful power to be given to this committee? Is it to elicit fraud or crime, in order that the offender may be convicted and punished? No, sir,—but it is to enlighten the judgment of this committee, as they say, upon a mere matter of ordinary legislation. Sir, the rightful exercise of this power is confined to a few cases. These are, where frauds or crimes are imputed, and where the sole object is to detect, expose or punish the guilty. There is no instance, under this Government within my recollection, where this power has been given for the mere purpose of enabling the committee of this House to adjust the details of an ordinary bill. What, sir, is this enormous power to be given over into the hands of a committee, of a tribunal of seven men, in this land of freemen, to drag before them, by force, if need be, the citizens of this Republic, to instruct the members of that committee, or of this House, in the common and ordinary duties of legislation.[1]

It was also maintained by the opposition that the powers of the House of Representatives could not be compared with those of the House of Commons since the latter was restrained by no written constitution.[2]

The resolution was finally adopted, as amended, by a vote of 102-88, which indicates the strength of the opposition to the exercise of this power by the House.

With the proceedings in this case concluded, the inquisi-

[1] 20th Cong., 1st sess., *Debates*, pp. 865, 866.

[2] *Ibid.*, p. 882.

torial power of Congress may be classified into three lines of development: (1) its use in connection with the express privileges of Congress as granted in the Constitution, or ancillary privileges implied by Congress from those granted, such as the right to protect itself in cases of bribery, libel and assault, (2) its use in compelling information about the administration of the law, (3) its exercise in compelling information to aid in the making of legislation.

Our study of the proceedings in Congress described so far, clearly indicates the extension of this three-headed power, in spite of strenuous opposition at times. The opposition to this power was especially strong where there was a tendency to delve into private affairs and to infringe upon personal liberty, or where this power came into direct conflict with executive prerogative. That this was a rather common tendency may be seen from a study of the preceding cases. In this connection Schouler says of the closing era of good feeling:

> Committees instituted inquiries, ran the eye up and down accounts, pointed out little items, snuffed about dark corners, peeped behind curtains and under beds, and exploited every cupboard of the executive household with a mousing alacrity, not so eager it would appear, to correct abuses as to collect campaign material for damaging some candidate and playing the detective in preference to the judge.[1]

With the exception of the first use of this power mentioned above, there was no express constitutional basis for such development. Common law, the necessity of the case, the inherent nature of a legislative body, previous precedent in England, and common sense, were all used as arguments to support this extension of power.

Up to this time only one statute had been passed which had any relation to the subject.[2] Until 1821 no court decision of

[1] III Schouler, *History of the U. S.* (Washington, 1880-91), p. 258.

[2] See *infra*, ch. v.

any importance had been made concerning this power, but in spite of this lack of authority, Congress boldly proceeded to hew out a line of development closely approximating that of the English Parliament. Apparently personal liberty was not to stand in the way of public necessity in proceedings of this character even though such liberty was guaranteed in the Constitution. Undoubtedly the decision in Anderson v. Dunn [1] was looked upon in Congress as sanctioning a wide extension of the power to punish for contempt, and it may have had some influence on the proceedings of 1827 in the House, described above.

Two groups then appeared in Congress, one advocating a wide extension of the power of compulsory investigation on the ground that such power was essential to the effective performance not only of its judicial duties, but also of its general duties of legislation. In carrying out this view they maintained that both Houses of Congress could investigate the administrative departments and hence could supervise the character of the administration, that they could make general inquiries for the purpose of collecting facts essential to the enactment of wise legislation, and finally that they could investigate and punish for contempt in cases involving breaches of their privileges. The group opposing this wide extension of the compulsory power of investigation maintained that since the exercise of such power was a judicial proceeding, it could be used by Congress only in cases where the Houses had received a judicial grant in the Constitution, that is, in connection with their enumerated privileges or those implied privileges involving the right to protect their existence. The cases studied in this chapter indicate that this power was used indiscriminately, regardless of the argument of the opposition.

The next chapter will discuss the leading cases illustrating the exercise of this power between 1827 and 1876.

[1] 6 Wheaton, p. 204 (1821).

CHAPTER III

Congressional Practice and Procedure Between 1827 and 1876

On April 4, 1828 Mr. James Hamilton of South Carolina, from the Select Committee on Retrenchment in the Expenses of the Government, reported the following resolution to the House: "Resolved, That the Select Committee on the subject of retrenchment, be empowered to send for persons and papers for the purpose of continuing and completing the examination." [1] Mr. Wood of New York, in opposing the granting of this power, pointed out the practice of Parliament, which he apparently considered was contrary to that suggested in the resolution.[2]

Mr. Strong, also of New York, objected to the conferring of this power on the committee saying that he had never been one of those who had denied the constitutional power of the House to authorize a standing committee to send for persons and papers. He did not object to the resolution on that ground. In fact, he said, it might be proper and sometimes indispensably necessary, to delegate this high power to a committee of this House. Nor was his objection due to any want of confidence in the members of the committee. But his objection was to the general unlimited grant of this power, either to this or to any other committee, or indeed, to any select body of men. It is a high trust, a great power. It is confided to this House, and as it acts, when exercised,

[1] 20th Cong., 1st sess., *Debates*, p. 2157.

[2] *Ibid.*

[3] 20th Cong., 1st sess., *Debates*, p. 2157.

and can act only upon the personal liberty and private confidence of the citizens, and upon every citizen, from one extreme of the country to the other, he was decidedly against giving it to any body of men, to be exercised at their will, and upon whom they please. He said that

his opinion had been and still was, that this power to send for persons and papers should not be granted, unless the objects of it were specified. The witnesses and documents wanted ought to be named. This can always be done with sufficient certainty. The exercise of this enormous power will thus be limited and safe. It will then be always under the control of the House. He added that if the honorable mover of the resolution, would name the witnesses and papers, and state that they were necessary to the proper investigation of the matter in hand, he would have his support.[1]

Mr. Storrs of New York also objected to the exercise of this power, "unless some reasons were offered in favor of it." None had been given, and he asked the Chairman of the Committee to inform the House for what purpose the Committee asked this power—to what objects it was to be applied—and to show that it was necessary to the discharge of their duties.[2]

The Chairman, Mr. Hamilton, in reply said that

the Committee had been particularly charged to examine into the number of clerks in the several departments, and the necessity of retaining them. In the discharge of this duty, the Committee were of the opinion that it would be, on all accounts most proper to go into an oral examination, which could only be done by requiring the attendance of the clerks. Another object, to which their inquiries were to be directed, was the contingent expenses of the Department. On this, also, the Committee thought it material to require a verbal explanation of the

[1] 20th Cong., 1st sess., *Debates*, p. 2157.

[2] *Ibid.*

various items, and that the examination should be conducted under oath.[1]

After this explanation, the question being put on the resolution, it was carried without count.

Another extensive investigation of the Post Office Department occurred in 1830. By a resolution of December 15, 1830 a Senate committee was instructed to "examine and report the present condition of the Post Office Department; in what manner the laws regulating that Department are administered; the distribution of labor; the number of clerks—and generally, the entire management of the Department."[2] Clayton reported from the committee on January 27, 1831 that its unanimous opinion was, "that, in order to prosecute that investigation with effect, it was necessary that they should be empowered to send for persons and papers" and proposed a resolution to that effect.[3] It was adopted without debate. On February 2, 1831 Grundy proposed a resolution that the committee be "not authorized to call before them the persons who have been dismissed from office, for the purpose of ascertaining the reasons or causes of their removal."[4] On the ground that the Senate had no right to call upon the President for the reasons for his removals from office, Livingston suggested amending Grundy's resolution to prevent the committee from making an "inquiry into the reasons which have induced the Post Master General to make any removals of his deputies."[5] In this form the resolution was adopted by a vote of 24 to 21. The committee made its report on March 3, 1831.[6]

[1] 20th Cong., 1st sess., *Debates*, pp. 2157, 2158.

[2] 21st Cong., 2d sess., *Debates*, pp. 4-8 (1830).

[3] *Ibid.*, p. 40 (1831).

[4] *Ibid.*, p. 78.

[5] *Ibid.*, pp. 194-197.

[6] 21st Cong., 2d sess., *Senate Doc. no. 73*, Ser. No. 204.

A searching investigation into charges against the President and his cabinet was instituted by the House in 1832.[1] A resolution was passed appointing a committee to inquire

whether an attempt was made by the late Secretary of War, John H. Eaton, frauduently to give to Samuel Houston—a contract—and that the said committee be further instructed to inquire whether the President of the United States had any knowledge of such attempted fraud, and whether he disapproved of the same; and that the committee have power to send for persons and papers.

In its report the committee acquitted Eaton of the charges of misconduct.

A wide extension of the inquisitorial power of the House developed in the case of the investigation of the Bank of the United States in 1832. On February 23, 1832 Mr. Clayton of Georgia submitted the following resolution to the House: "Resolved, That a select committee be appointed to examine into the affairs of the Bank of the United States with power to send for persons and papers and to report the result of their inquiries to this House."[2] Mr. John Quincy Adams of Massachusetts criticised this resolution as proposing an investigation not within the power of the House; and hence to prevent improper inquiry, he proposed an amendment following the words of the charter establishing the bank. His amendment was as follows; strike out all after the word resolved and insert:

That a select committee be appointed to inspect the books and examine into the proceedings of the Bank of the United States to report thereon, and to report whether the provisions of its charter have been violated or not; that the said committee have leave to meet in the city of Philadelphia, and shall make their

[1] 22d Cong., 1st sess., *H. R. Rep. no. 502*, Ser. No. 228.

[2] 22d Cong., 1st sess., *Debates*, p. 1846.

final report on or before the 21st of April next; that they shall have power to send for persons and papers, and to employ the requisite clerks; the expenses of which shall be audited and allowed by the Committee of Accounts, and paid out of the contingent fund of the House.[1]

Mr. James K. Polk of Tennessee criticised the amendment as placing upon the committee a limitation as to the time within which they should make their report. He believed there was no precedent for this. However Mr. Adams' amendment was agreed to by a vote of 106-92. The resolution as amended was then adopted.

In making a report as a member of the minority of this investigating committee, Mr. Adams stated his reasons for offering this amendment.[2] He said:

The amended resolution adopted by the House was predicated upon the principle that the original resolution presented objects of inquiry not authorized by the charter of the bank, nor within the legitimate powers of the House, particularly that it looked to investigations which must necessarily implicate not only the president and directors of the bank, and their proceedings, but the rights, the interests, the fortunes, and the reputation of the individual not responsible for those proceedings, and whom neither the committee nor the House had the power to try, or even accuse before any other tribunal. In the examination of the books and proceedings of the bank the pecuniary transactions of multitudes of individuals with it must necessarily be disclosed to the committee, and the proceedings of the president and the directors of the bank, in relation thereto, formed a just and proper subject of inquiry—not however in the opinion of the subscriber, to any extent which would authorize them to criminate any individual other than the president, directors and officers of the bank or its branches—nor them otherwise than as forming part of their official proceedings. The subscriber be-

[1] 22d Cong., 1st sess., *Debates*, p. 2160.

[2] 22d Cong., 1st sess., *Debates*, Appendix, p. 54.

lieved that the authority of the committee and of the House itself did not extend, under color of examining into the books and proceedings of the bank, to scrutinize, for animadversion, or censure, the religious or political opinions even of the president and directors of the bank, nor their domestic or family concerns, nor their private lives or characters, nor their moral or political, or pecuniary standing in society, still less could he believe the committee invested with a power to embrace in their sphere of investigation researches so invidious and inquisitorial over multitudes of individuals having no connections with the bank other than that of dealing with them in their appropriate business of discounts, deposits and exchanges.[1]

It is obvious from a reading of this amendment to the original resolution that a distinction was drawn between the public relations of a bank to the government and its dealings with private individuals. By the introduction of this amendment, Mr. Adams attempted to forestall the investigation of matters irrelevant to the question at issue. He was also anxious to protect the "sanctuary" of private life. He showed in his report that the majority of the investigating committee did not adhere to the principles suggested in the amendment.

The course of investigation pursued by the Committee has, however, been not conformable to the principles of the resolution adopted by the House, but to those of the original resolution, which the House did not accept; a consequence which was naturally to be expected, from the circumstance that a majority of the committee was appointed from the minority of the House, that is, from those who had voted against the amendment adopted by the House.[2]

There seemed to be no restriction on the latitude of the investigation, as the committee investigated the personal

[1] 22d Cong., 1st sess., *Debates*, Appendix, p. 54.

[2] *Ibid.*, pp. 55, 56.

accounts of private individuals, including editors of newspapers, printers, solicitors, attorneys, brokers, members of Congress, and officers of the Government, whom they thought "game fairly to be hunted down if they had an account in the bank; because the committee were authorized to examine the books and papers of the corporation."[1] Questions were asked of these witnesses which could not, under any possible interpretation, be shown to have any relevancy to the proper operation of the bank. It is significant that one citizen, Mr. Silas E. Burrows, was subpoenaed to appear before the committee, but estimating his own rights, declined to give attendance. No proposal was made in the committee to issue compulsory process against him.[2]

The committee, for the most part, had no idea of the subject they were investigating. One example will suffice to show their ignorance of banking. They claimed the bank officers were to blame for the operation of Gresham's law, saying

> that the president and the directors of the bank have been guilty of the crime of receiving and paying Spanish dollars, and even our own gold coins, at their intrinsic value, which is higher than that given them by the statute. To give more for domestic coined gold, than its value as established by law, was unlawful.[3]

A reading of the report of this committee shows the wide field of inquiry covered and the complete ignoring of the advisabilty of investigating only pertinent matter. But as Adams said: "The natural and irresistible tendency of the investigations conducted on such principles must be to substitute passion in the place of justice, and political rancour in the place of impartiality."[4] Again he stated:

[1] 22d Cong., 1st sess., *Debates*, Appendix, p. 73.

[2] *Ibid.*, p. 57.

[3] *Ibid.*, p. 68.

[4] *Ibid.*, pp. 55-70.

If under a power to appoint investigating committees, a constructive power is given to sport with the feelings and fortunes, and reputation of honest and honorable men, because they happen to hold the office of president and directors of the Bank of the United States, there is surely no authority given in the bank charter to pry into the accounts and pecuniary transactions, and to scrutinize the fortunes and characters of thousands of individual citizens of the Union, merely because they have an account in the bank, which, in the examination of the books and proceedings of the corporation, must incidentally be disclosed.[1]

That Adams felt strongly opposed to the exercise of unlimited powers of investigation by Congress is seen in his attitude in this and subsequent cases. During this same year for example, he felt constrained to resort to the House's power of impeachment in order to justify its grant of the power to send for persons and papers to a committee charged with making an investigation into the conduct of the Commissioner of the General Land Office in reference to his alleged refusal to mark out the boundaries of a proposed land district for Michigan.[2] On this ground he moved the reference of this inquiry from the Committee on Private Land Claims to the Judiciary Committee, which was carried by a vote of 72 to 66. His opposition to these inquiries is further seen in an inquiry made in 1834 into the affairs of the second United States Bank.[3]

The first case where a member of either House was assaulted for "words spoken in debate" which was made the subject of investigation by either House and the assailant punished either by fine, imprisonment or reprimand, occurred in the proceedings of the House against Sam Houston.

The member assaulted was William Stanbery of Ohio,

[1] 22d Cong., 1st sess., *Debates*, Appendix, pp. 55-70.

[2] 22d Cong., 2d sess., *Debates*, p. 2199 (1832).

[3] See *infra*, ch. iii, pp. 119-122.

who wrote the following note to the Speaker on April 14, 1832:[1]

Sir, I was waylaid in the street, near to my boarding house, last night about 8 o'clock, and attacked, knocked down by a bludgeon, and severely bruised and wounded by Samuel Houston, late of Tennessee, for words spoken in my place in the House of Representatives, by reason of which I am confined to my bed and unable to discharge my duties in the House and attend to the interest of my constituents. I communicate this information to you and request that you lay it before the House.

Whereupon Mr. Vance of Ohio, submitted the following resolution, which was adopted by a vote of 145-25: Resolved,

That the Speaker issue his warrant directed to the Sergeant at Arms attending this House, commanding him to take into custody wherever to be found, the body of Samuel Houston; and the same to keep in his custody subject to the further order and direction of this House.

The resolution was objected to on the ground that it assumed the fact that a contempt had been committed on the House, and that the House possessed the power to punish it. As one member said: "Every gentleman must be aware that a great difference of opinion always had existed as to the power of the House to punish as a contempt, any act not committed in its presence."[2] It was maintained by the opposition to this resolution that the House had no power to punish for contempts, unless in those cases when its deliberations had been directly interfered with. The English law of privilege and power of the British Parliament to punish for contempts (which was undefined, unlimited and unknown to the subject, except as particular cases occurred)

[1] 22d Cong., 1st sess., *Debates*, p. 2512.

[2] *Ibid.*, p. 2513.

in which the Parliament in their omnipotent discretion, chose to exercise it, was held incompatible with the principles of our government and against the dictates of justice.

In the course of the debate on the resolution, an amendment was submitted for the appointment of a select committee to investigate the matter, but this seems not to have been acted upon.[1]

Those advocating the adoption of the resolution held that the House had the power to conduct such proceedings based upon the necessity of self-preservation.[2] It was claimed that the House had the right to act on the principle that the representatives there assembled were the American people, that an insult to them was an insult to that people, and that, as representing the people, they had a right to punish it.[3]

The resolution was finally adopted by the House.

On April 16, 1832, Mr. Davis of Massachusetts offered the following resolution: Resolved,

That Sam'l Houston be brought before the bar of the House on Thursday next, at 12 o'clock, to answer to the charge made against him by William Stanbery of Ohio, a member of this House, in his letter and affidavit; and that he forthwith be furnished with a copy of said charge and letter of said Stanbery by the clerk.

Accordingly, Mr. Houston was brought before the House and notified by the Speaker of the charge against him and informed that if he wished the aid of counsel or witnesses or wanted time to prepare his defense, he should make known such desires to the House.[4] He answered that he did not care for counsel but would require the attendance of witnesses

[1] 22d Cong., 1st sess., *Debates*, p. 2518.

[2] *Ibid.*, p. 2522.

[3] *Ibid.*, p. 2525.

[4] *Ibid.*, p. 2549.

and twenty-four hours to prepare a response to the accusation.

A resolution was then adopted by the House, providing for the appointment of a committee on privileges to report a mode of proceedings. The committee brought in a report the following day recommending the following proceeding:

Said Sam'l Houston shall be again placed at the bar of the House, and the letter of William Stanbery shall be read to him; after which the Speaker shall put to him the following interrogatory; Do you admit or deny that you assaulted and beat the said Wm. Stanbery as he represented in the letter which has been read, a copy of which has been delivered to you by the order of the House?

If the said Sam'l Houston admit that he assaulted and beat the said Stanbery as in the letter represented, then the Speaker shall put to him the following interrogatory; Do you admit or deny that the same assault and beating were done for and on account of words spoken by said Stanbery in the House of Representatives in debate? If the said Houston admit the assault and beating and that they were done for the cause aforesaid, then the House shall consider the charge made by the said Stanbery as true, and shall proceed in judgment thereon.

But if the said Houston deny the assault and beating, or that the same were done for the cause aforesaid, or refuse or evade answering the said interrogatories then the said Wm. Stanbery shall be examined as a witness touching the said charge after which, the said Houston shall be allowed to introduce any further evidence the House may direct shall also be introduced. If parol evidence is offered, the witnesses shall be sworn by the Speaker, and be examined at the bar, unless they are members of the House, in which case they may be examined in their places. A committee shall be appointed to examine witnesses. The questions put shall be reduced to writing (by a person to be appointed for that purpose) before the same are proposed to the witnesses; and the answers shall also be reduced to writing.

Every question put by a member, not of the committee, shall be reduced to writing by such member, and be propounded to the witness by the Speaker, if not objected to, or any testimony offered shall be objected to by any member, the member so objecting, and the accused or his counsel, shall be heard thereon, after which the question shall be decided without further debate.

When the evidence is all before the House, the said Samuel Houston shall be heard on the whole matter himself or his counsel, as he may elect. After the said Sam'l Houston shall have been so heard, he shall be directed to withdraw, and the House shall proceed to consider the subject, and to take such action thereon as may seem just and proper.

The report of the Committee on Privileges in this case has been given in full in order to show the character of the procedure in the House. Although Houston stated at first he did not care for counsel, he changed his mind later, and a motion was passed in the House granting his belated request for counsel. He appeared before the bar of the House with his counsel and after the Speaker had notified him of the charge he answered by making a general denial.

His counsel, Francis S. Key, then asked the House to remove a member who as the accused believed, had formed and publicly expressed an opinion on the case.[1] In other words he wished to challenge the jury. Some members were in favor of making such a motion so as to be sure Houston received a fair trial, others protested that the House had no right to grant such a motion. "What power or authority had they to disfranchise a portion of the inhabitants of the Union," asked one member. Till a member had been tried and expelled, no vote of that House could deprive him of the right to act in all the capacities for which he had been sent there. Before the question was voted on, Mr. Key asked

[1] 22d Cong., 1st sess., *Debates*, p. 2563.

leave to withdraw the motion before the House and his motion was granted.[1]

A very interesting question brought up in these proceedings was the probability of the release of the prisoner on bail. A resolution was offered to the House proposing the release of Houston on his furnishing security for his appearance before the House. In support of the resolution it was stated that the House must be authorized to take bail for appearance as other courts of justice could do in all cases of assault and battery; and as one member said, "it was strange that the House could have power to order arrest, and yet have their power to liberate on bail denied."[2]

In opposition to such proceeding, it was held that no such instance had occurred, wherein bail had been taken for the appearance of a person brought before the House of Commons in England, or the House of Representatives.[3]

The question was asked: "To whom was the bond to be executed—to the Speaker? If so, how could the Speaker proceed to enforce the collection, if the bond was forfeited?" Others opposing the adoption of the resolution showed that the bond would depend for its enforcement on some outside aid, whereas, "so long as the respondent remained in the custody of the officer of the House, every order it passed might be enforced." The motion calling for the adoption of the resolution was eventually withdrawn.[4]

In the trial of Houston which followed in the House, is found a splendid example of its inability to conduct such a proceeding according to any recognized system of legal procedure. All sorts of evidence were submitted during the

[1] 22d Cong., 1st sess., *Debates*, p. 2566.

[2] *Ibid.*, p. 2569.

[3] *Ibid.*, p. 2570. (See speech of Mr. Dickinson of New York on previous practice.)

[4] *Ibid.*, pp. 2567-69.

trial including hearsay and innuendo. At every opportunity the counsel for the accused would insert a question further to obstruct the proceedings of the House. The House debated a month on this case, most of the time with reference to the constitutionality of the procedure. Every argument which had been made in previous cases against the exercise of the power of Congress to punish for contempt was used in this case. Precedent back to the time of Magna Charta was cited in support of the opposition.

It seemed to be generally admitted by the opposition that if the contempt had been committed in the presence of the legislature, there would have existed no doubt as to the power of Congress to punish. But inasmuch as the act constituting contempt was committed on the street, although Stanbery was then attending the session of the House, the opposition to the proceedings held that he should have acted as any private citizen would, if assaulted by another, viz. bring suit in the courts.

The point was also made in the trial that while Stanbery had made derogatory remarks concerning Houston in debate in the House, he had not been whipped for what he had said there, as the accused was fully aware of the exemption from arrest of members for what is said in debate, but rather Houston had assaulted Stanbery because he had published his speech in the papers, and punishment for this did not constitute a breach of the privileges of the House. The fact of the matter was that the House had never had a similar case and was rather slow to assume the power, especially in view of the strong opposition.

The opposition to the proceedings had one good point. They claimed

> that the whole proceeding in this case shows us to be the most unfit triers; and that in periods of high party excitement, this enormous power may be used, and probably will be, to the great

oppression of the citizen. What excitement and warmth of feeling have we witnessed on this trial? How unlike grave judges have we occasionally appeared. The case before us is an ordinary case of assault and battery, such as one of our courts of quarter sessions would have tried and disposed of in less than half a day; and yet here we have been, at the most important period of the session, engaged near a month in trying it.

One member said: "I take upon myself no part of the responsibility for this useless consumption of the time of the House." [1]

To the first part of this argument, a very good answer was given by Mr. Ellsworth of Connecticut, who said:

I freely concede that this is a power of dangerous character; and what then? All power is dangerous; but whatever it is, we lay it down once in two years, and give an account of its exercise. All power is liable to abuse, and if gentlemen will allow none to be possessed but what may be abused, how much do they leave to us? The idea is utopian that government can exist without leaving the exercise of discretion, in some degree, somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be enhanced by monsters of imagination, but individual liberty can be in little danger.[2]

The main question settled in this case seems to have been whether the House has a right to take cognizance of an assault committed by third parties out of doors, on a member who rises in the House, and upon his official responsibility utters his sentiments as in his opinion, duty demands.

[1] 22d Cong., 1st sess., *Debates*, p. 2838.

[2] *Ibid.*, p. 2843.

The House finally recognized Houston's act as a contempt and punished him with a reprimand from the Speaker, after which he was discharged from custody.[1]

The powers of a legislative investigating committee were extensively challenged in the investigation of the Bank of the United States by a committee of the House in 1834. The directors of the bank resisted the authority of the House to compel the production of the books of the bank before the committee and objected to the investigation on the ground that it involved a general search of the affairs of private individuals.

On March 18, 1834 the Committee on Ways and Means, to whom had been committed the report of the Secretary of the Treasury stating his reasons for ordering the public deposits to be removed from the Bank of the United States, made a report recommending four resolutions for adoption by the House. The first three resolutions were adopted by the House by a close vote, the fourth by a vote of 175-42. The fourth resolution as adopted by the House was as follows: Resolved,

That for the purpose of ascertaining, as far as possible, the cause of the commercial embarrassment and distress complained of by numerous citizens of the United States in sundry memorials which have been presented to Congress at the present session, and of inquiring whether the charter of the Bank of the United States has been violated, and also what corruptions and abuses have existed in its management; whether it has used its corporate power, or money, to control the press, to interfere in

[1] This case is of special interest as Houston was later indicted, convicted and punished in the courts of the District of Columbia (154 U. S. 478) although he pleaded the punishment of the House of Representatives as a bar to the court proceedings against him. Hence this case establishes the precedent that proceedings for contempt and by indictment for the offense are entirely distinct, and neither proceeding is a bar to the other. Also see *Op. Atty. Gen.*, vol. ii, p. 668.

politics or influence elections, and whether it has had any agency, through its money or management, in producing the existing pressure; a select committee be appointed to inspect the books and examine into the proceedings of the said bank, who shall report whether the charter has been violated or not, . . . and the said committee be authorized to send for persons and papers, and to summon and examine witnesses on oath, and to examine into the affairs of the said bank and branches; and they are further authorized to visit the principal bank, or any of its branches, for the purpose of inspecting the books, correspondence, accounts and other papers connected with its management or business; and that the said committee be required to report the result of such investigation, together with the evidence they may take, at as early a day as practicable.[1]

A committee of seven members was appointed and reported back to the House on May 22.[2] The proceedings of the committee, in the form of extracts from its Journal, were appended to the report, and showed that the committee met at the North American Hotel at Philadelphia, on April 23, and informed the president of the bank that they were ready to proceed to business the ensuing day.

On April 24 the committee were informed by officials of the bank that arrangements would be made to accommodate them at the bank, and that a committee of seven members of the board of directors had been appointed to receive the committee and offer them the books and papers necessary for the investigation.[3] On April 26 the investigating committee agreed to and forwarded to the committee of the directors resolutions stating

that the proceedings, investigations and examinations of the books and papers and affairs of the bank shall be confidential,

[1] 23d Cong., 1st sess., *Debates,* vol. x, pt. 3, pp. 3473, 3474, 3475, 3476.

[2] *Ibid.,* vol. x, pt. 4, app., p. 187.

[3] *Ibid.,* p. 189.

unless otherwise ordered by the committee, and that the investigations of this committee into the affairs,—management and concerns of the Bank of the United States shall be conducted without the presence of any person who is not required or invited to attend the examinations of this committee.[1]

The Board of Directors responded to this resolution by protesting that they could not consent to give up the custody and possession of the books and papers of the bank, nor to permit them to be examined but in the presence of the committee appointed by the Board. They protested against secret or partial investigation.[2]

The committee replied on April 29 claiming the right, to be exercised at its discretion, to compel the production of the books and papers of the bank for inspection, and to inspect the same in such mode as the committee might deem best calculated to promote the object of its inquiry. They stated also that they did not purpose making a secret or partial examination and that they would afford every person whose character or conduct might seem to be affected by the investigation a full opportunity of explanation and defense, but they claimed the right of determining the time and mode of giving such privilege, and therefore could not recognize the right of the directors to prescribe the course to be pursued by this committee in making its examination.[3]

On April 30 the committee again claimed that "they have the power to compel the production of the books and papers of the bank for inspection; that they have the power to make such inspection in the presence of those only who may be, by the Committee, required or invited to attend."[4]

The committee of the directors refused to give up the

[1] 23d Cong., 1st sess., *Debates*, vol. x, pt. 4, app., p. 189.

[2] *Ibid.*

[3] *Ibid.*, p. 191.

[4] *Ibid.*

books and papers to the investigating committee unless they were examined in their presence. After sundry requests and demands were made by the committee, all of which were refused by the bank officials, the committee finally issued a subpoena *duces tecum* as follows:

By Authority of the House of Representatives
of the United States.

To Benjamin S. Bonsall,

Marshall of Eastern District of Pennsylvania.

You are hereby commanded to summon Nicholas Biddle, president, . . . to be and appear before the committee of the House of Representatives of the United States appointed on the fourth day of April 1834, for the purpose of ascertaining etc. . . . to bring with them, the credit books of said bank, showing the indebtedness of individuals to said bank on the 10th day of May instant at the hour of 12 o'clock M. and to submit said books to said committee for inspection.

Herein fail not and make return of this summons.

Witness the seal of the House of Representatives of the United States and signature of Hon. Francis Thomas, chairman of said Committee, at the city of Philadelphia, this 9th day of May, 1834.

Francis Thomas.

attest; M. S. Franklin,
Clerk, House of Representatives, U. S.

At the appointed time Nicholas Biddle and associates named in the subpoena appeared and delivered their answer in writing, in which they stated they did not produce the books as "they are not in the custody of either of us." As to testifying, they said: "Each of us says for himself that, considering the nature of the proceeding and the character of the inquiry, and considering that as corporators and directors we are parties to the proceedings we do not consider

ourselves bound to testify, and therefore respectfully decline to do so." [1]

Whereupon the investigating committee recommended five resolutions to the House,[2] the fifth being: "That the Speaker issue his warrant to the Sergeant at Arms, to arrest Nicholas Biddle and associates . . . and bring them to the bar of this House, to answer for their contempt of its lawful authority." [3]

The committee, in making its report, called attention to the fact that the bank was chartered for a great public purpose, that the House is the grand inquest of the Nation, and as such has power to inspect all departments of the Federal Government. This power has also been expressly reserved in the Bank charter which stated "that it shall at all times be lawful for a committee of either House, appointed for that purpose, to inspect the books and examine into the proceeding of the corporation hereby created, and to report whether the provisions of its charter have been violated or not." [4]

The committee also argued that any doubt as to the reserve power of the House had been settled in the House investigation of 1832, where a committee examined into the general management of the bank, examined fully and freely the transactions of individuals and even published them. The committee stated that the managers of the bank on those occasions did not question the authority of the committee to make the examinations.

A minority report, made by two members of the committee one of whom was John Quincy Adams, severely criticised the proceedings. They claimed that the charter was a contract proposed by the government to the stockhold-

[1] 23d Cong., 1st sess., *Debates*, vol. x, pt. 4, app., p. 192.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

ers, that the power of visitation and examination was onerous to the stockholders and that a resolution of the House passed in virtue of its general power of inquisition could not enlarge the specific provisions of the law. The minority claimed that the resolution authorizing the committee to investigate

did not put it in the power of the committee to issue warrants of general search, and compel the appearance of citizens, and the production of papers, not in proof or disproof of charges against third persons, by evidence of which they are the legal depositories but in order to enable such a committee to find out by these papers whether those who bring them are not themselves guilty. It cannot be within the competence of a committee of the House to institute a general search and compel the citizens on oath to purge themselves if innocent and criminate themselves if guilty, and bring with them their papers to be ransacked in a roving hunt for unspecified crimes.

The Constitution reserves to the people the right to be secure in their persons, papers and effects, against unreasonable searches and seizures. Of all unreasonable searches that can be imagined, none is more signally so than a general search into the papers possessed by a person, whether individual or corporate, with a view to find matter of crimination against that person. A general search for any purpose is unreasonable; for the object of criminating the individual searched, it would be at odds with the first principles of justice, and, as expressed by a committee of the House of Representatives, an enormous grant of power. It would be unreasonable, because, no man is beyond the possibility of so doing wrong; the right to institute a general search, if it existed, would be a right of inquisition into the affairs of every individual in the community—a right too extravagant to be claimed by any government pretended to be limited by law, and never exercised by any but those odious and arbitrary tribunals which are handed down to the undying execration of mankind.[1]

[1] 23d Cong., 1st sess., *Debates*, vol. x, pt. 4, app., p. 194.

With reference to the right of the committee to hold its meetings in secret, the minority stated that they believed it to be "contrary to the Lex Parliamentaria for a committee of inquiry on its own authority, to claim the right of holding its sittings, except when deliberating and voting, in secret. It can only be constituted a secret committee by express order of the House." [1]

In discounting the force of precedent as established in the investigation of the Bank in 1832, the minority admitted this investigation assumed the same character as the one under discussion, but with this difference:

At that time neither House of Congress had assumed a hostile position to the bank. Its directors felt, as later events proved, that they could rely on the National Legislature doing them justice. Applicants for a recharter, they felt they could not, with propriety, object to any latitude of inquiry which might be demanded of a House of Congress willing to grant a recharter, provided the result of the examination proved satisfactory. Accordingly, the resolution, as amended, was understood to extend not merely to alleged violations of the charter, but to all cases of official misconduct, and on the arrival of the committee in Philadelphia, the directors of the bank, instead of placing themselves upon their rights, ordered the president of the institution to submit all its books and papers to the unconditional inspection of the committee, and to yield himself to an unreserved examination. The inquiry was pushed into every matter of alleged abuse, where it was supposed the bank was most vulnerable. Nothing was spared, nothing was held back.

The minority report also denied the legality of the subpoena *duces tecum* issued by the committee. They said:

That such a process is no subpoena *duces tecum* is obvious from the fact that it is addressed to the parties concerned. It is no process in chancery, requiring a party to produce his books and

[1] 23d Cong., 1st sess., *Debates*, vol. x, pt. 4, app., p. 195.

papers; for its avowed object is to inquire whether "a criminal prosecution shall be instituted," an object for which the Chancellor will require no man to produce his papers. Unlike any of the processes known to humane jurisdiction of the present day, it is, in their most odious features, identical with the general warrants of the dark ages of English liberty, and the Writs of Assistance which first kindled the spirit of resistance in the American Colonies. It is a compulsory process to compel the good people of the United States to produce their books and papers, and submit them to general search in proof of crimes not charged but suspected; to be enforced by attachment, imprisonment and infinite distress; a search of accounts, a search of letters, and an examination on oath of the persons implicated, touching the matters whereof they are suspected.[1]

Summarizing, then, the position of the minority was that they did not deny the power of the House to inquire into any alleged abuse or corruption and they believed that the committee was authorized to make such inquiry, but they did not believe the power of the committee authorized them to prosecute a secret inquiry of indefinite character. It did not extend the right of inspecting the books, granted for one purpose alone, so as to authorize their inspection for purposes totally different. It did not empower the committee to issue warrants of general search, and compel the appearance of citizens and the production of papers, not in proof or disproof of charges against third persons, but to enable the committee to find out from the papers whether those who should bring them were themselves guilty of misdemeanors. A general search was repugnant to the Constitution.

The resolutions of the committee, reported to the House on May 22, were not acted upon by the House, so apparently the report of the minority of the committee had the greatest influence with the House. The officers of the bank were not punished for the contempt alleged by the committee.

[1] 23d Cong., 1st sess., *Debates*, vol. x, pt. 4, app., p. 203.

The question as to the general authority of the House to compel testimony and the production of papers in an investigation and the relation of this right to the rights of individuals to privacy in business affairs, were discussed in another House investigation in 1837.

On January 3, 1837 the House agreed to the following resolution: Resolved,

That a committee of nine members be appointed, whose duty it shall be to inquire whether the several branches employed for the deposit of public money, have all, or any of them, by joint or several contract, employed any agent to reside at the seat of government to transact their business which he is so employed to transact, and what compensation he receives; whether said agent, if there be one, has been employed at the request or through the procurement of the Treasury Department; whether the business of the Treasury Department with said banks is conducted through said agent; and whether in the transaction of any business confided to said agent, he receives any compensation from the Treasury Department; and that said committee have power to send for persons and papers.[1]

In the course of the investigation of the committee, the following resolution was offered: Resolved,

That R. M. Whitney be summoned to appear before the Committee, at the room of the Committee on Commerce, on Thursday morning next, at 10 o'clock, and that he be required to bring with him, the books, papers and memoranda relating to his agency with the deposit banks; that he produce all the correspondence between himself and any person or bank going to show the existence of that agency; that he produce the originals where in his power, and copies, where the originals are not in his possession; that he produce all the contracts which he has made or proposed, with and to any bank, or correspondence held in relation to the public deposits; all books, papers, etc. going

[1] 24th Cong., 2d sess., *Globe*, pp. 69, 73.

to show the amount of his compensation, and the character of the business which he is employed to transact.[1]

One or two members of the committee objected to the adoption of the resolution, as they doubted the power of the committee to require the production of all the papers required.

On January 25 Mr. Whitney filed with the committee a written protest in which he declared that the committee in calling for an indefinite mass of papers, many of them private, had exceeded their inquisitorial power. The resolution, he observed, under which they acted, provided for three branches of investigation: first, the Treasury Department and its officials, secondly, the several banks employed for the purpose of deposit of public moneys, and lastly, himself. To the first branch of the inquiry he professed no relation, and in no manner would draw in question the power of the committee. As to the second, he believed that the mere fact that they had entered into a contract with a department of the government, did not give one branch of Congress any authority to examine into their business transactions or their relations with their agents. With reference to the third branch of the inquiry, he said there were two questions, first, as to whether he had been employed as agent of the banks through the procurement of the Treasury Department; and second, as to his business arrangements with such of the deposit banks as constituted him their agent. As to the first question, he stated he had answered all queries coming under this head and still held himself ready to do so, but under the second he had not answered on the ground that they were inquisitorial in their nature, going into the personal and private transactions and relations between himself and his employers.

[1] 24th Cong., 1st sess., *House Rep. no. 193*, p. 2.

In referring to the subpoena, that it was sweeping and indefinite in the number and description of papers cited and that it searched deeply into his correspondence, he said:

If the power to send for papers which may be rightfully delegated to and exercised by a committee of Congress, be susceptible of any more reasonable limits than that of the power to send for persons, I am advised that it may be clearly reduced to two very simple heads; (1) All that can be denominated public papers, as belonging to the public archives of any branch of any department of the government, and which might be required for the information of Congress upon any matter touching the public administration; (2) Such private papers in the hands of individuals as are necessary to the advancement of justice in the exercise of the judicial power of Congress, understanding that power as limited to impeachments. Then such private papers, and such only, are included as would, if produced, be competent evidence in a criminal prosecution, and in a prosecution not against the party cited in the papers.

The rules of procedure, long established by the courts of ordinary judicature and sanctioned by the veteran experience and wisdom as indispensable to the liberty and safety of the citizen, can not be dispensed with by Congress when it assumes the tribunal and exercises its constitutional functions of criminal judicature. Now, these rules were strictly limited, and guarded the process for papers in criminal proceedings, as, indeed, in civil. The paper must be described with reasonable certainty so as to be distinguished and identified; above all, it must be made clearly to appear, before its production is required, to be competent and pertinent evidence to the issue, or if the issue be not yet formed, still competent and pertinent evidence to the issue to be found.

Therefore the witness concluded that the committee might not demand the production of a large and miscellaneous mass of private papers, the contents of which and the conclusions from which were utterly unknown beforehand. In his view

the power of the committee to send for papers and persons did not go to this extent.

The committee did not compel Whitney to answer questions which he considered inquisitorial, though they said Whitney's protest was based upon the idea of a claim of power in compelling the production of private papers and in examining into private transactions, action which it has not taken. They said they realized the resolution was general and called for no specific paper.

> It calls generally for such papers, etc. as may shed light upon the inquiries directed by the House. The committee in adopting this resolution, made it general, because they had no knowledge of the peculiar nature of the papers held by the witness, whether they were of a purely private or public character, and could not, therefore, designate any particular paper for which to make a call, and because they thought it due to the witness himself that he might have the opportunity of producing such papers of a private nature as he might deem necessary for the purpose of explanation if such explanation should be deemed necessary by him. Immediately following the adoption of the resolution referred to, the committee made an express reservation of the question what papers they would or would not compel the production of, until the witness had determined for himself which he would or would not produce. . . . The committee has not in a single instance attempted to enforce the production of any paper objected to by the witness. The committee did not think it necessary to discuss the power of the House to institute this inquiry, as it presumed the House, in adopting this resolution creating the committee, well understood its power and its duty and did not act hastily, in instituting inquiries beyond the reach of the one or the other.[1]

While Whitney was involved in a discussion with this committee, he got into trouble with another House committee

[1] 24th Cong., 1st sess., *House Rep. no. 193*, p. 1.

for refusing to obey their subpoena. On January 17, 1837 the House adopted the following resolution: Resolved,

That so much of the President's message as relates to the "conduct of the various Executive Departments, the ability and integrity with which they have been conducted, the vigilant and faithful discharge of the public business in all of them, and the causes of complaint from any quarter, at the manner in which they have fulfilled the objects of their creation", be referred to a select committee, to consist of nine members, with power to send for persons and papers, and with instructions to inquire into the conduct of the various Executive Departments, the ability and integrity with which they have been conducted, into the manner in which the public business has been discharged in all of them, and all causes of complaint from any quarter at the manner in which said departments, or their bureaus, or officers, or any of their officers or agents of every description whatever, directly or indirectly, in duties pertaining directly to the public interest, have fulfilled or failed to accomplish the objects of their creation, or have violated their duties, or have injured or impaired the public service and interest and that said committee in its inquiries may refer to such periods of time as to them may seem expedient and proper.[1]

In the course of the committee's investigation Whitney refused to obey a subpoena to attend, declaring that he had already been insulted and menaced and would not appear further until his wrongs had been redressed. Whereupon the committee reported the fact of his refusal to attend to the House as follows:

Reuben M. Whitney who has been summoned to appear as a witness before this committee, having, by letter, informed the committee of his peremptory refusal to attend, it becomes the duty of the committee to make the House acquainted with the fact; Therefore, Resolved, That the Chairman be directed to re-

[1] 24th Cong., 2d sess., *House Journal*, p. 232.

port the letter of Whitney to the House, that such order may be taken as the dignity and character of the House required.[1]

On the following day in the House this report was discussed and various propositions were made, (1) to arrest Whitney for contempt, (2) to summon him to appear and show cause why an attachment should not issue against him for contempt, and to cause the committee to report to the House certain circumstances occurring in the committee room during an examination of Whitney on a preceding day.

In speaking against the power of the House to punish for contempt, Mr. Claiborne of Mississippi said:

Sir, your doctrine of contempts is a dangerous doctrine, that originated in times unfavorable to human liberty; in those days of privilege and prerogative, when the rights of citizens, if understood, were not defined and when parliamentary bodies were used by the king as instruments of oppression and persecution. The power of Congress to punish for contempts, if the power exists at all, is not expressly conferred but is incidental, and arises "ex necessitatis rei." Where is the clause in the Constitution making the grant and defining the contempt? Sir, it is a constructive and incidental power. The powers and privileges of Congress which may be in some measure regarded as distinct, are there laid down. The powers and privileges of Congress, are not, like those of the English Parliament, unlimited, undefined, and omnipotent, on the contrary they are abridged and specific. We cannot transcend them. Any effort to enlarge them would be to usurp from the people authority heretofore not granted to us by them. Tell me, where is their grant to you to issue a warrant against Whitney? You arraign him before a tribunal prejudiced against him; some of those who compose it are his avowed enemies; you try and convict him, there is no appeal from your verdict. . . . Can you convert this House into a judicial tribunal, which shall be the judge,

[1] 24th Cong., 2d sess., *Debates*, pp. 1685-1707.

witness, accuser and prosecutor in its own case, and inflict any punishment it chooses? [1]

Several vitriolic speeches were made against the House's exercising this power, while practically nothing was said for the report of the committee. The speeches made against this power of Congress contained a great deal of partisanship. All the opposing speeches were made by Southern Congressmen, and at least one of them protested against the exercise of the power on the ground that many other contempts had been suffered by the House, as for example, that of John Adams in asking Congress to consider the petition of twenty-eight slaves, yet nothing had been done in any of these cases. This member considered the offense of Whitney a minor one compared to these. Elaborate arguments were made in the course of the debate on this report to show that the precedents of the English Parliament could not be followed to the extent demanded in this case, by a House limited by a written constitution.

In spite of the lack of supporting argument, the House, finally, by a vote of 99 yeas to 86 nays, agreed to the following: Resolved,

That whereas the select committee of this House, acting by authority of the House under a resolution of the 17th January last, has reported that Reuben M. Whitney has peremptorily refused to give evidence in obedience to a summons duly issued by said committee, and has addressed to the committee the letter reported by said committee to the House; Therefore, Resolved, That the Speaker of this House issue his warrant directed to the Sergeant at Arms, to take into custody the person of Reuben M. Whitney, that he may be brought to the bar of the House to answer for an alleged contempt of this House; and that he be allowed counsel on that occasion should he desire it.

[1] 24th Cong., 2d sess., *Debates*, p. 1707.

Whitney was brought before the bar of the House and thus addressed by the Speaker:

You have been brought here before the House, by its order, to answer the charge of an alleged contempt of this House, in having peremptorily refused to give evidence in obedience to a summons duly issued by a committee of this House, which committee had, by an order of the House, power to send for persons and papers.[1]

The Speaker then informed Whitney that he could have counsel if he so desired and that if he had any request to make he should make it now and the House would consider it, otherwise the House would proceed with investigation immediately. Whitney then read a paper, after obtaining permission of the House, in which he denied the intention of committing a contempt against the House and stated that he had refused to obey the summons of the committee, as he did not consider himself bound to obey a summons issued by the chairman of a committee, and secondly, he believed he could not attend without exposing himself to outrage and violence.[2]

While considering what course to pursue in Whitney's case, the point was made that he should retire during their deliberations. The Speaker noted that such had been the course in previous cases and hence he directed the Sergeant at Arms to retire with the prisoner.[3]

Several members thought that the prisoner ought to be discharged, claiming the House had no right to punish him for a contempt of the summons as the order itself was illegal, that moreover such an affair as this was wasting the time and the money of the House, and of the people of the United

[1] 24th Cong., 2d sess., *Debates*, p. 1739.

[2] *Ibid.*, p. 1739.

[3] *Ibid.*, p. 1740.

States. Finally a proposition was made for the appointment of a committee of privileges to report a mode of proceedings (a procedure usually followed in previous cases) and it was finally accepted. This committee reported the following resolution: Resolved,

That Reuben M. Whitney be now permitted to examine witnesses before this House in relation to his alleged contempt, and that a committee of five be appointed to examine such witnesses on the part of the House; that the questions put shall be reduced to writing, and the answers shall also be reduced to writing. Every question put by a member, not of the Committee, shall be reduced to writing by such member, and be propounded to the witness by the Speaker if not objected to; but if any question shall be objected to, or any testimony offered shall be objected to by any member, the member so objecting, and the accused or his counsel, shall be heard thereon; after which the question shall be decided without further debate. If parol evidence is offered, the witness shall be sworn by the Speaker and be examined at the bar, unless they are members of the House, in which case they may be examined in their places.[1]

The question arose before the trial proper as to the legality of the process issued by the committee which led to the contempt by Whitney. A member submitted the following resolution:

Whereas, by the 11th rule of this House, all acts, addresses, and joint resolutions, shall be signed by the Speaker, and all writs, warrants and subpoenas, issued by this order of the House, shall be put under his hand and seal, attested by the clerk; And whereas, the subpoena by virtue of which Whitney, now in the custody of the House for an alleged contempt for refusing to appear and give testimony before one of the select committees of the House, was not under the seal and hand of the Speaker, and attested by the clerk, but signed by the Chairman of the

[1] 24th Cong., 2d sess., *Debates*, p. 1752.

select committee; Therefore, Resolved, That the refusal of R. M. Whitney to appear and testify before said committee was not a contempt of this House, Resolved, That the said Whitney be forthwith discharged from the custody of the House.[1]

The answer to this proposal was that the member suggesting it had misconstrued the rule, the distinction being made that when the House issued an order or warrant in a particular case, under this rule, the Speaker must issue the summons under his hand and seal, and it must be attested by the Clerk; but when the power was granted to a committee to send for persons and papers in a particular case, without asking the House to consider the propriety of doing it in each case as it might arise, a summons signed by the Chairman of the committee was sufficient, and had always been held to be so.

The latter opinion prevailed and the proposition was tabled by an overwhelming vote.[2]

Subpoenas were issued for the witnesses named by Whitney. The members of the House who were witnesses were first sworn.

The examination of witnesses was continued until February 20th, the record of questions and answers appearing in the Debates. A study of the examination shows that there had been difficulty between the accused and some members of the investigating committee, and that at one time there had occurred a difference in the committee room which nearly led to the use of weapons. It was suggested in the House that the witness had been deterred by fear from obeying the subpoena of the committee.

Finally the following resolution was agreed to by a vote of 99 to 72: "Resolved, That it is inexpedient to prosecute further the inquiry into the alleged contempt of R. M. Whit-

[1] 24th Cong., 2d sess., *Debates*, pp. 1760, 1761.

[2] *Ibid.*, p. 1764.

ney against the authority of this House; and that the said Whitney be now discharged from custody." [1]

The adoption of this resolution by the House should not be considered as denying the power of the committee to issue compulsory process. It is obvious that the majority of the House thought Whitney was justified in believing that he might meet with violence if he appeared in answer to the subpoena.

This case is a splendid example of the irregular proceedings carried on by the House in such trials. On the question of this contempt there was a protracted debate lasting more than a month, a vast amount of irrelevant testimony was introduced, an infinite number of questions of evidence were raised until practically the whole House was impressed with the futility of the affair. It should be remembered that other important business of the House was put aside during these proceedings.[2]

Whitney's case is important in this study in that it discusses the right of the House to punish for contempt and refers to English precedents. The proceedings in this case uphold the validity of a subpoena signed only by the chairman of a committee. The procedure in the case is typical. The following points should be noted: (1) In the resolution ordering the arrest and arraignment of Whitney, the House at the same time gave him permission to have counsel. (2) The House ordered that Whitney, under arrest for contempt, should be furnished with a copy of the report as to his alleged contempt before arraignment. (3) While on trial at the bar of the House, Whitney was given permission to examine witnesses. (4) In the trial at the bar of the House both questions to witnesses and their answers were reduced to writing and appear in the Journal. (5) For the more

[1] 24th Cong., 2d sess., *Debates*, p. 1879.

[2] See *Debates*, 24th Cong., 2d sess., pp. 1686-1883.

orderly conduct of the trial a committee was appointed to examine witnesses. (6) The rule was adopted in the Whitney case, for disposing of objections to questions proposed to witnesses, that the question should be put to the whole house as to whether the question should be put to the witness.

The House committee appointed on January 17, 1837 "to examine into the condition of the Executive Departments etc.," had a checkered career. On January 23, it adopted a series of resolutions calling on the President and heads of departments for information of various kinds. One of these resolutions was as follows: Resolved,

That the President of the United States be requested and the Heads of the several departments be directed to furnish this committee with a list, or lists, of all officers or agents, or deputies, who have been appointed or employed and paid since 4th of March 1829, to the first of December last (if any without authority of law) or whose names are not contained in the last printed register of public officers commonly called the Blue Book by the President or either of the said Heads of Departments respectively; and without nomination to, or the advice and consent of the Senate of the United States showing the names of such officers or agents or deputies; the sums paid each, the services rendered and by what authority appointed and paid; and what reasons for such appointments.

Resolved, That the various executive officers, in replying to the foregoing resolution, be requested, at the same time, to furnish a statement of the period at which any innovations, not authorized by law (if such exist) had their origin, their causes, and the necessity which has required their continuance.[1]

By order of the committee the chairman transmitted to the President of the United States a copy of the above resolutions. The copy transmitted in the letter of the chairman was attested by the clerk of the committee. On January 27,

[1] 24th Cong., 2d sess., *Debates*, vol. xiii, Appendix, pp. 199, 200.

Mr. Andrew Jackson, Jr. Secretary of the President, entered the committee room and delivered to the Chairman, Mr. Henry A. Wise of Virginia, a letter addressed to Mr. Wise, and giving the President's reasons for not complying with the request of the committee. The President pointed out in his letter that the resolution adopted by the House authorizing the investigation cast doubt upon the statement in his annual message, that the executive departments were in excellent condition. He stated further:

The first proceeding of the investigating committee is to pass a series of resolutions, which, though amended in their passage, were, as understood, introduced by you, calling on the President and the Heads of Departments, not to answer to any specific charge, not to explain any alleged abuse, not to give information as to any particular transaction, but assuming that they have been guilty of the charges alleged, calls upon them to furnish evidence against themselves. After the reiterated charges you have made, it was to have been expected that you would have been prepared to reduce them to specifications, and that the committee would then proceed to investigate the matters alleged. But, instead of this, you resort to generalities even more vague than your original accusations; and in open violation of the Constitution, and of that well established and wise maxim, that all men are presumed to be innocent until proven guilty; according to the established rules of law, you request myself and the Heads of Departments to become our own accusers, and to furnish the evidence to convict ourselves; and this call purports to be founded on the authority of that body, in which alone by the Constitution, the power of impeachment is vested. The Heads of Departments may answer such a request as they please, provided they do not withdraw their own time and that of the officers under their direction, from the public business to the injury thereof. . . . For myself, I shall repel all such attempts as an invasion of the principles of justice, as well as of the Constitution; and I shall esteem it my sacred duty to the people of

the United States to resist them as I would the establishment of a Spanish inquisition.[1]

The President further lectured the chairman of the committee and concluded his letter by expressing astonishment that the House should make such a call on the executive when there were six standing committees of the House specifically charged with examining the details of expenditures in the Departments.[2]

The attitude of the President greatly enraged the chairman of the committee and on January 30, he offered these resolutions to the committee: Resolved,

That the letter of the President of the United States dated the 26th inst. addressed to the Chairman of this committee and handed to him by the private secretary of the President in the presence of the committee, is an official attack of the President upon the proceedings of the House of Representatives and of this committee, and upon the privileges of members of both Houses of Congress, and opposes unlawful and unconstitutional resistance to the just powers of the House of Representatives and of the committee; Resolved, That the Chairman of the committee be directed to report to the House his letter and the resolutions of this committee inclosed, addressed to the President, and the letter of the President in reply thereto, dated the 26th inst. and to submit to the consideration of the House the propriety and necessity of adopting measures to defend its proceedings, to protect the privileges of its members; and to enforce its just powers and those of its committees; to enable this committee to discharge the duties devolved upon it by the resolution of the 17th inst. adopted by the House of Representatives.

These resolutions were voted down by a vote of 6 yeas to 3 nays. An effort was made to consider and amend them, but it failed.

[1] 24th Cong., 2d sess., *Debates*, vol. xiii, Appendix, p. 202.

[2] *Ibid.*, p. 202.

It seems that the majority of the committee opposed their chairman and in their report stated:

Neither did the committee discover in the letter of the President any attack upon the proceedings of the House or the privileges of its members, for the plain reason that neither the House nor its members have any privilege to call upon parties accused to criminate themselves. Consequently they could not sanction the resolution offered by the Chairman to censure the President for his emphatic repulsion of what he construed to mean charges of personal accusation, and calls for self crimination; nor could they consent to put a stop to the public business by getting up a debate in the House to enforce any pretended privilege of the House or its committees to compel public officers to furnish evidence against themselves. The committee were satisfied of the impropriety and inconsistency of all the calls upon the President and Heads of Departments embraced in the resolution offered by the Chairman; but to reject them entirely in the beginning, although in effect, they called upon the accused to furnish evidence against themselves, might have subjected the committee to the charge of suppressing evidence, or inquiry. They preferred, therefore, to assume the responsibility of giving too great latitude to inquiry, rather than to seem to check it in the beginning.[1]

The majority of the committee believed, as stated in their report, that this investigation could be instituted only for one of two purposes — impeachment or legislation; they maintained it could not be one for legislation because no defect in the laws has been anywhere alleged, except in their execution. Hence they could only regard this investigation in the light of a preliminary inquiry into facts and evidence, to show whether a process of impeachment ought not to be instituted by the House of Representatives against the Executive and the Heads of Departments. Strong proof

[1] 24th Cong., 2d sess., *Debates*, vol. xiii, Appendix, p. 194.

that this investigation could be regarded only in the light of an inquiry preliminary to impeachment, they held, lay in the fact that one of the powers conferred on the committee by the resolution of the House was the power to send for persons and papers. As they said:

At best, this is a vague and not well defined power; incidental and not derived from any express provision in the Constitution. In its exercise therefore, there should be some limitation; and it should be carefully used; only in cases where the direct legislation of Congress, the protection and enforcement of the privileges and rules of either House, or manifest public interest demand it. It is a judicial power, which Congress can exercise merely as a power incidental to the power, "to make all laws which shall be necessary and proper." To construe it into an unlimited power for a committee of this House to bring before them the persons of citizens from any part of the Union, at their own arbitrary will without just cause, or to compel the surrender of all papers which a committee might see fit to send for, would be to set up an incidental power of the House nowhere expressly recognized in the Constitution, which would totally annul one of the express provisions of the Constitution, to secure the citizen against these very outrages, viz. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."

The committee decided they did not have the right to demand all the personal and private papers of public officers, in order that the committee could decide whether there were any which ought to go into the public files, and concluded their report by stating that "so far as had come to their knowledge, from the results of this investigation, the condition of the various Executive departments is prosperous, and that they have been conducted with ability and integrity."

Mr. Wise, the chairman of the committee held that

this letter of President Jackson is an official assumption of au-

thority by the executive over the proceedings of the House of Representatives, and over the proceedings of one of its committees, that it is an official attack upon the privileges of members of both Houses of Congress; and that it opposes an unauthorized resistance to the just powers of the House and its committee, in direct hostility to inviolable principles necessary to the administration of a free government.[1]

He believed that this government was instituted for the common benefit, protection and security of the people, that its form was adopted as one most effectually secured against the danger of maladministration; that all power is vested in and consequently derived from the people, that magistrates are their trustees and servants at all times, and amenable to them.

That if neither House of Congress could nor would, inquire, into the official conduct and administration of executive officers, the people who could not inquire in their aggregated or conventional capacity, and the States which cannot, from their own organization and that of the Federal Government, institute inquiries at all efficiently, could never be informed of the official conduct of their federal officers; and these officers would, in effect, become irresponsible for their acts, except such as they might disclose, being unknown.

Mr. Wise differentiated between "inquiries" and "inquisitions." Inquiry into the condition and conduct of public affairs is a right of legislators. Inquisition into the conduct and condition of private affairs is no right, even of the sovereign power. Inquisition would violate the 4th Article of the Amendments to the Constitution. The resolution of inquiry did not invade the security of these rights, as was urged by those in favor of the amendments proposed to it. That article reads:

The right of the people to be secure in their persons, houses,

[1] 24th Cong., 2d sess., *Debates*, vol. xiii, Appendix, p. 203.

papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

This right is the right of the people. Are the executive departments and their officers the people? They belong to the people; though the history of Government proves too sadly that, without constant vigilance and strict superintendence over them by the people or their representatives, the people soon come to belong to them. Had these officers the right to be secure from all inquiry? It was thought that they were mere trustees and servants, who might be called upon at any time to give an account of their stewardship. The inquiry proposed by the resolution was not deemed unreasonable.[1]

The chairman mentioned some of the standing rules of the House, such as Rule 57 which made it the duty of the Committee on Ways and Means to examine into the state of the several executive departments. He said:

If the resolution of the House was inquisitorial, these rules were and have been, from the earliest period of the existence of the House itself, standing inquisitions. There was the duty enjoined to examine into the state of the several executive departments. There was a search for any and whatever abuses might be found to exist, and a report of them required. Was it ever dreamed that these standing rules were inquisitorial? No. They were the institutions of wise and jealous patriots, to insure that eternal vigilance which is the price of liberty.

He mentioned several previous inquiries[2] to show that general and indefinite investigations had been made before.

In concluding his report he claimed to have proved that the majority of the committee showed very little disposition to

[1] 24th Cong., 2d sess., *Debates*, vol. xiii, Appendix, p. 204.

[2] *Ibid.*, p. 205. *E. g.* Post Office Investigation, June 26, 1834.

pursue inquiry, and showed every disposition to sustain the President and the departments in their positions, and in their course of obstructing fair and full investigation. This he said was proved by the following procedure of the committee: (1) the member of the committee at whose instance a witness was called, was required to state in writing the charges the witness was expected to sustain, (2) the committee positively determined that it would not, in the absence of definite, specified charges of corruption and abuses, inquire into the reasons of the executive, or heads of departments, for appointments to, or removals from office, in direct contradiction to the House, which rejected the amendment requiring specific charges, (3) it decided that when definite and specific charges were made of corruption and abuses in appointments and removals from office, and in subsidizing the public press, it would not inquire into them. The questions which were propounded to witnesses also showed that the committee desired to shield the executive, according to Mr. Wise. He claimed there was neither consistency, nor propriety, nor liberality nor fairness, in propounding or rejecting interrogatories. Some questions were proposed to witnesses which in substance were rejected as to others.[1] Subjects of inquiry of the deepest interest to the public were peremptorily excluded from investigation.

But the Chairman said:

> Such a procedure was to be expected from the committee from the moment of its appointment. Six friends of the executive to three of the opposition were placed upon it by the Speaker, who is supposed to owe his election to the influence of the President over a House where there is an overwhelming majority in favor of the administration; and of these six, several were known, by their speeches on the floor, to be utterly opposed to the resolution under which the committee was appointed and to the investigation which that resolution instituted.

[1] For a list of the questions see *ibid.*, pp. 214, 215.

This case represents one of the most successful attempts of a President of the United States to resist a congressional inquiry. Jackson's position in these proceedings was probably strengthened by the fact that he had an overwhelming majority in the House and he knew he could successfully resist an investigation for that reason, as his own party would not take serious issue with him. The fact that the committee reported that all was well with the executive departments after this feint at an investigation shows the importance of considering the political character of the committee personnel in these investigations. Investigating committees, packed with members in sympathy with the administration might well become vehicles of vindication for the executive.

In fact, there is ample evidence that such has been the case in more than one such investigation. In this connection McConachie says:

> Upon an investigating committee elected by ballot the friends of President Van Buren charged that the majority had chosen six well qualified members to represent itself, but had forced upon the minority three incompetent representatives; that upon another, upon the adoption of the Lecompton Constitution, Schouler affirms that Speaker Orr in order to stifle the matter, gave a majority of one to those who opposed the inquiry. Andrew Jackson came from Tennessee to Washington in 1819 to await impatiently the conclusion of the inquiry into the Arbuthnot and Ambrister affair; with the decision of the committee in his favor, the political doom of those who pressed for the investigation was sealed.[1]

In 1839, during the investigation into the affairs of the New York Customs House by a select committee, a call was made upon the collector to furnish the committee with certain correspondence. In response the collector questioned

[1] McConachie, *op. cit.*, p. 231.

the authority of the committee to make the demand on him, under the language of the resolution creating the committee: "That the said committee be required to inquire into and make report of any defalcations among the collectors, receivers, and disbursers of the public money, which may now exist, the length of time they have existed and the causes which led to them." [1]

The collector claimed that in the light of this language he had the right of being informed whether the committee or any of its members charged him with being a defaulter. The committee responded by repeating the call for the correspondence and by agreeing to the following resolution: Resolved

That this committee cannot recognize the authority or right whatever in any collector, receiver, or disburser of the public money to call upon the committee or any of its members to prefer or disavow a charge of his being a defaulter, "before such officer sends the correspondence of his office, when required under the authority of the House of Representatives, to send for persons and papers" to enable its committee to inquire into and make reports of any defalcations among receivers, collectors and disbursers of the public money which may now exist; nor can this committee or any of its members tell whether Mr. Hoyt is or is not a defaulter until by examination of the persons and papers for which it has sent and will send—And when the committee shall have found the facts embraced by these inquiries or closed its investigations it will make a report thereof to the House of Representatives.

To this statement Collector Hoyt replied by asking for a full investigation of his accounts and transmitting the letters called for.[2] The committee's report of February 27, 1839 revealed the various defalcations and pointed to negligent supervision by the Secretary of the Treasury.

[1] 25th Cong., 3d sess., *House Report no. 313*, pp. 326, 349.

[2] *Ibid.*

During this year the House also authorized a committee to

inquire into the official conduct of Captain J. D. Elliott of the United States Navy, while in command of the squadron in the Mediterranean—and particularly into allegations of tyranny and oppression towards officers under his command; and that the said committee have power to send for persons and papers—.[1]

In 1842 the House passed a resolution requesting certain information of President Tyler, namely, the names of such members, if any, of the 26th and 27th Congress as have been applicants for office with the details relating to such applications. Tyler refused on the ground that as the appointing power is vested solely in the executive, the House could have no legitimate concern therein.

Tyler later complied with a similar request of the House in another matter but said:

Nor can it be a sound position that all papers, documents and information of every description which may happen by any means to come into the hands of the President or the Heads of Departments must necessarily be subject to the call of the House of Representatives, merely because they relate to a subject of the deliberations of the House, although that subject may be within the sphere of legitimate powers. . . . The executive Departments and the citizens of this country have their rights and duties as well as the House of Representatives and the maxim that the rights of one person or body are to be exercised as not to impair those of others is applicable in its fullest extent to this question.[2]

The first case involving libelous publication after the case of Duane,[3] which affected the Senate and incidentally the President and the British Ministry, occurred in 1846.[4]

[1] 25th Cong., 3d sess., *Globe*, p. 195.

[2] For review of this case see *Cong. Record*, 69th Cong., 1st sess., Feb. 25, 1926, p. 4548.

[3] See *supra*, ch. ii, pp. 42-53.

[4] 29th Cong., 1st sess., *Globe*, March 12, 1846.

The charge was made that a corrupt combination had been made by the British Minister (Packenham) on the one hand with a few recreant Democratic Senators and with a majority of Whig Senators on the other, to defeat the policy of President Polk in respect to the "Oregon question." It was specifically charged that at a dinner given by the British Minister, at which several Senators were present, corrupt conversations were had between said minister and Senators; that a certain meeting was held by Whig Senators in a room at the capitol at which the British Minister was present, and that a certain admission had been made by Senator John M. Clayton, of Delaware, confirming certain portions of the charges made by the *Times*.

The above is the substance of the printed matter published in the *Times* which resulted in the appointment of a committee as set forth in the following resolution: Resolved,

That a committee of five members be appointed to inquire and report what measures, if any, are proper to vindicate the honor and character of the Senate against the charges of corruption, published in a newspaper printed in Washington City, called the Daily Times, on the 5th, 9th, 10th, and 11th instants, with power to examine witnesses and send for persons and papers.

The committee in conducting its inquiry directed its researches with a view to ascertaining the truth of the charges of corruption made in the Times and of arraigning or punishing the authors of the publication. The editors of the paper were summoned before the committee and state they had no personal knowledge of the truth of anything written in said articles.

Senator Benton in making the report for the committee stated that "each of the specifications in the charges made in the *Times* was found upon investigation to be utterly and entirely false."[1] As to punishment, the committee recom-

[1] 29th Cong., 1st sess., *Sen. Rep. no. 222.*

mended the printing of their report, and all the testimony taken by the committee; and that the editors and publishers of the *Times,* Mr. H. H. Robinson and Mr. J. E. Dow and their reporters be excluded from the gallery of the Senate reporters. The report of the committee was unanimously concurred in.

This case is important in that it shows the power of the Senate to conduct investigations and compel testimony in cases of libel as well as its power to punish for such libels.

President Polk, in 1846, refused the request of the House for information, pointing out the confidential nature of the information although admitting that the House could obtain information in a formal proceeding for impeachment, when its power would be plenary. He said further:

> If the House as the grand inquest of the Nation should at any time have reason to believe that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and pages of the executive departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation.[1]

An early discussion as to the form of resolution ordering the arrest of a contumacious witness occurred in 1849.[2] On January 12th, Mr. George Fries of Ohio, a member of the select committee appointed to investigate the official conduct of the Commissioner of Indian Affairs, reported the following resolution: "Resolved, That the Sergeant at Arms be required to take David Taylor into custody and confine him unless he agrees to answer all proper questions which the

[1] See *Record,* 69th Cong., 1st sess., p. 4548.

[2] 30th Cong., 2d sess., *Globe,* pp. 242-244.

select committee before whom he has been testifying shall ask of him.[1]

It was explained that this witness, who had been duly subpoenaed, was under examination by a subcommittee, and after having given a portion of his testimony, declined to answer further. The subcommittee reported to the full committee, and in the course of the debate it was stated that the winess had declined before the full committee to testify further. Strong objection was raised to granting the committee the power of committing a witness. Mr. Cobb of Georgia, leading the opposition, said in the view he took of the case, he differed in opinion with gentlemen who think that this House can confer a power on any committee, or that any committee of this House, in virtue of their appointment possesses a power which would authorize them to imprison a witness. He did not believe that the committee possessed this power or that the House could confer it. Nor did he believe that the facts reported would justify the imprisonment of the witness; but they certainly did justify on the part of the House, his arrest for contempt. He proposed a substitute resolution reading exactly like the one in the Whitney case.[2] This resolution was carried over to the succeeding day when, by direction of the committee, the subject was withdrawn from further consideration by the House.

In the following year the House refused to punish two contumacious witnesses reported to it by Mr. Edward Stanley of North Carolina, from a select committee appointed by a resolution of the House of the 6th of May to investigate the activities of office holders under the last administration, interfering in elections.[3] These two witnesses, Thomas

[1] 30th Cong., 2d sess., *Globe*, p. 242.

[2] See *supra*, ch. ii, pp. 123-134.

[3] 31st Cong., 2d sess., *Globe*, pp. 1678, 1679, 1680, 1681.

Ritchie and C. P. Sengstack, had refused to answer certain questions put to them on the ground that they were not compelled to answer questions pertaining to their private business. It seems that the majority of the personnel of this committee was Whig and this investigation was a Whig investigation to throw discredit on the Democrats. After a lengthy discussion, which dealt mostly with personalities and political questions, the House refused to uphold the committee and punish the witnesses. The debates on this case show to what lengths the political parties of the day would go to discredit their opponents. This case also resurrected the ever-recurring question as to how far a committee could go in exercising its inquisitorial powers. To what questions could it coerce answers? No direct answer was made to this select committee by the House except to discredit its report.[1]

On April 3, 1850 the Speaker laid before the House a letter from George W. Crawford, Secretary of War, requesting an investigation as to his relation to the notorious Galphin claim. A committee was appointed on motion of Toombs.[2] The House later gave the committee power to send for persons and papers,[3] and on May 17, the committee reported condemning the payment of the claim.[4]

The proposal of Richardson in the House on April 22, 1850 to authorize the appointment of a committee with power to send for persons and papers, to investigate whether Thomas Ewing, Secretary of the Interior, had paid certain claims after they had been disallowed by the proper accounting officers caused an acrimonious debate.[5] The resolution was finally adopted by a vote of 95 to 73.[6] The committee's

[1] 31st Cong., 1st sess., *Globe*, p. 1724.

[2] 31st Cong., 1st sess., *Globe*, p. 628.

[3] *Ibid.*, p. 719.

[4] *Ibid.*, Appendix, p. 546.

[5] 31st Cong., 1st sess., *Globe*, pp. 782-783.

[6] *Ibid.*, p. 791.

report made on September 6, 1850 held that there had been improper payment of certain claims.[1]

The Smithsonian Institution was investigated in 1855 under a resolution of the House which authorized a committee to inquire "whether the Smithsonian Institution has been managed, and its funds expended, in accordance with the law establishing the institution; and whether any additional legislation be necessary to carry out the designs of its founders; and that said committee have power to send for persons and papers."[2] The committee in its report made recommendations for a rearrangement of functions.[3]

On May 22, 1856 while Senator Sumner was seated at his desk in the Senate Chamber, after adjournment for the day, he was assaulted by Representative Preston S. Brooks of South Carolina, and severely wounded. The following day the matter was brought to the attention of the Senate by Senator Henry Wilson of Massachusetts, whereupon a resolution was offered in the Senate providing for the appointment of a committee of five to inquire into and report the facts to the Senate. The resolution was adopted and five Senators were elected by the Senate to membership on this committee.[4]

A few days later the committee made its report, stating there was no question but that Senator Sumner had been severely beaten by Brooks for what he had said in debate. However, the committee refrained from making any comment on the case, referring to circumstances which preceded and attended it, and after referring to previous cases of a similar nature, held that inasmuch as Brooks was a member of the House, the Senate could do nothing in the case except

[1] 31st Cong., 1st sess., *H. R. Rep. no. 489,* Ser. No. 585.

[2] 33d Cong., 2d sess., *Globe,* pp. 282-283.

[3] 33d Cong., 2d sess., *H. R. Rep. no. 141,* Ser. No. 808.

[4] 34th Cong., 1st sess., *Globe,* p. 1279.

to make complaint to the House of the assault committed by one of its members upon Senator Charles Sumner of Massachusetts. The House also appointed a committee to consider this case and the majority of the committee recommended the expulsion of Mr. Brooks. This recommendation was defeated by a few votes, but Brooks resigned from the House. He was later reelected.

Mr. William H. Kelsey of New York referred to the House on January 9, 1857[1] an editorial article in the *New York Times* of January 6th in order that it could be read to the House. Among other things, it charged the existence of land lobbies in Washington which had corrupted certain Congressmen to hand over much of the Territory of Minnesota to speculators. After the Clerk had read the article Mr. Kelsey offered the following resolution:

Whereas, certain statements have been published, charging that members of the House have entered into corrupt combinations for the purpose of passing and preventing the passage of certain measures now pending before the House and whereas a member of this House has stated that the article referred to is not wanting in truth; Therefore; Resolved, That a committee consisting of five members, be appointed by the Speaker with power to send for persons and papers, to investigate said charges; and that said committee report the evidence taken and what action in their judgment is necessary on the part of the House without any unnecessary delay.

There was some opposition to the proposed investigation on the score that it would consume the very valuable time of the House and also, that an investigation of this sort was beneath the dignity of the House; however the fact that one of the members of the House had asserted that there was some truth in the charges led finally to an almost unanimous de-

[1] 34th Cong., 3d sess., *Globe*, p. 274.

mand that the investigation take place, and the resolution was agreed to.

After the committee had been in session ten days, Mr. Orr of South Carolina, one of the five members of the committee, reported that he had met with certain obstacles in the conduct of the investigation. He stated that during the conduct of the investigation they had summoned, as a witness, J. W. Simonton, the correspondent of the *New York Times*, that among others, the following question was put to him: "You state that certain members have approached you, and have desired to know if they could not through you procure money for their vote upon certain bills; will you state who these members were? And the said Simonton made thereto the following response: "I cannot without a violation of confidence, than which I would rather suffer anything." In response to other questions of similar import, he said: "Two have made them direct, others have indicated to me a desire to talk with me on these subjects, and I have warded it off, not giving them an opportunity to make an explicit proposition." To the question, "What do I understand you to mean when you say that these communications were made direct?" Simonton replied:

> I mean that, after having obtained my promise of secrecy in regard to them, they have said to me that certain measures pending before Congress ought to pay; that the parties interested in them had the means to pay; that they individually needed money, and desired me specifically to arrange the matter in such a way that if the measures passed, they should receive pecuniary compensation.

The committee were impressed with the materiality of the testimony withheld by the witness, but they decided to give him time to think over whether he would answer the question or not.

The committee believed it unnecessary to establish the

power of the House in this case. They referred to the Act of May 3, 1798 [1] and previous precedent. They concurred unanimously in the opinion that the House is clothed with ample power to order the party into custody, there to remain until released by the same authority, or upon the expiration of the present Congress. The committee recommended the adoption of the following resolution which was agreed to by the House: "Resolved, That the Speaker issue his warrant, directed to the Sergeant at Arms demanding him to take into custody the body of the said J. W. Simonton, wherever to be found, and the same forthwith to have before the House at the bar thereof, to answer as for a contempt of the authority of this House." [2] When brought before the House a general argument ensued as to the proper procedure. Some doubted the power of the House to institute the investigation in the first place, others felt that Simonton was being dealt with illegally and without due process. For example, Mr. Burnett of Kentucky said:

When that special committee this morning reported a special resolution asking of the House the exercise of the highest power known to any individual—the deprivation of a citizen of his liberty—before I could vote for it I wanted to know the law upon which it was predicated. For this offense there is no express provision of law. I admit the power of the House to call witnesses before its committee, but there is no tribunal in the country, which can deprive a citizen of his liberty and inflict punishment upon him without express provision of law.

The courts in the different states all exercise the power to punish contempts. Is it done without authority of law? Is it a power incident to their organization? Or is it only exercised in accordance with law? If gentlemen will look to the different states they will find that this power is exercised either by

[1] See *infra*, ch. v, p. 300.

[2] 34th Cong., 3d sess., *Globe*, January 21, 1857, p. 403.

express statute, or in accordance with the common law, and never otherwise. The legislatures of the several states may exercise this power unless expressly deprived of the right by the organic law of the states: for they can exercise all the powers of Government not forbidden. But, sir, how is it with us? We can only exercise such powers as are expressly granted or incident to those granted. When we examine the question of the privileges of this House, we must first look to the Constitution, and we there find that the express grants of privilege are very few. What are they?—exemption from arrest, exemption from question elsewhere for what was said in the House and power over our members and proceedings. For the exercise of these powers no statute is necessary, the Constitution being the law. But sir, there is another power conferred; and if it had been exercised, we would have had no difficulty in this case. We have the power to make all laws necessary and proper for carrying into execution the powers vested in us by the Constitution. This power, with the express grants enumerated, confers upon Congress full power to pass a law punishing a witness for contempt. Congress has failed to exercise this power and we are now called upon to deprive a citizen of his liberty in the absence of any express law warranting it.[1]

However the majority opinion did not question the power of Congress in the premises and the prisoner was questioned by the Speaker. Still declining to answer the questions asked of him by the committee, he was put in jail until he finally made satisfactory answers, whereupon he was released, later expelled from his seat as a reporter on the floor.[2]

This case is important not only because it shows the power of the House to act in proceedings of this nature, but also because the special committee appointed to investigate the charges made by the *New York Times,* having found difficulty in extracting testimony from witnesses, recommended

[1] 34th Cong., 3d sess., *Globe,* January 21, 1857, p. 408.

[2] *Ibid.,* p. 408.

the passage of an act, which became the Act of January 24, 1857, entitled, "An Act more effectually to enforce the attendance of witnesses on the summons of either House of Congress and to compel them to discover testimony." That portion of the debate and proceedings referring to the enactment of this law is given in another place in this study.[1]

As a result of this investigation, several members of Congress resigned. From the testimony given, the committee were convinced that general charges of corruption in Congress originate from men who expect to make money by creating the belief that such corruption exists. If they can cause it to be generally believed that it is necessary to use large sums of money to carry measures through Congress, it follows that somebody must be employed to apply it, and the man who knows most about corrupt combinations would be the one naturally sought for and employed as broker to buy up the votes of members who had entered into such combination. Then too, newspaper correspondents are always on the watch for news and are particularly anxious to be first in giving to the public some piece of "startling intelligence" or "astounding development."

Much of the advertisement given Congress proved to be, on examination, founded on heresy or "moral conviction." The committee believed that for the licentiousness of the press, "the only remedy is the exposure of that licentiousness before the public; for when it has been exposed, its libels will fall harmless; it will no longer be able to shake by its imputations the confidence of the people in the purity of their representatives."

The first case in which a contumacious witness was certified to the District Attorney for the District of Columbia under the Act of January 24, 1857, occurred just one year later in the course of an investigation by a select committee appointed to

[1] See *infra*, ch. v, pp. 302-316.

investigate the charges preferred against the members and officers of the last Congress growing out of the disbursements of any sum of money by Lawrence Stone and Company of Boston or other persons, and report the facts and evidence to the House, with such recommendations as they may deem proper, with authority to send for persons and papers.[1]

When first brought to the attention of the House, it appeared that charges had been made in a published report of a committee of stockholders investigating the affairs of the Middlesex Manufacturing Co. that the Company had paid $87,000 to secure the passage of the Tariff Act of 1857. Mr. Stanton of Ohio, believing such a statement was prejudicial to the reputation of members of Congress, offered a resolution to the House stating the complaint of the committee and providing for two committees, one to investigate the charges and if they found any truth in them to present such specific charges before a second committee which would investigate the truth of the charges. He claimed as a reason for appointing two committees that the select committee investigating in the case of J. W. Simonton were compelled to combine the functions of a grand jury and petit jury, to inquire into the charge, and also to report the testimony and a resolution of expulsion. Much ado was made by Stanton and other members of Congress against the procedure of this committee, claiming that witnesses were called to testify against members of Congress in the absence of the latter, that evidence was taken in secret. As one member said:

I stand here then, to protest against this House raising a committee, at any time, to investigate the conduct of any of its members charged with I care not how small an offense affecting his integrity, without that member being called to confront the witness against him. ... Witnesses collected from your streets

[1] 35th Cong., 1st sess., *Globe*, p. 304 *et seq.*, Jan. 15, 1858.

with malignity in their hearts, and who can gloat over the ruin of those on whom they desire to avenge their supposed wrongs, will, in the dark, give testimony, which, with the eye of their victim flashing full on their face, they dare not give, their tongue would cleave to the roof of their mouth. . . . I trust the House will not regard the innovation of the investigating committee of the last House as affording a precedent to be followed; for never before, in the history of the Government, till then, did a committee appointed to investigate the conduct of members, sit with closed doors, and deprive the members implicated, of the right to confront the witness face to face.

On the other hand, Mr. Davis of Maryland claimed that the scheme of two committees would make the investigation ineffectual, stating:

Why, sir, the gentleman has hampered the great inquest of the country that will be charged to perform a lustration for the purity of this great central seat of its sovereignty with many of the forms, technicalities, and delays of the ordinary judicial process of the country. . . . I want it to be a free investigation, I want to have no technical difficulties interposed, which consume the time, weary the patience, prevent the judgment of the House, and fritter it away with minute details of order and precedent.

Mr. Davis believed that the Simonton investigation oppressed no man's rights, for the committee in taking evidence

did not spread it before the country until the party implicated had been notified; until he had had the opportunity of recalling the witnesses which the committee had already examined, and of reexamining those witnesses, and that with an advantage that no criminal before any tribunal has ever received, for sir, we know that the grand jury investigates in secret, keeps no record of the evidence, lays the indictment upon the table of the court and calls upon the defendant to plead to it. Then the suggestions of the grand jury are whispered into the ear of the prosecuting at-

torney, and these form the blank unwritten brief for his guidance in the source of the prosecution.

Eventually the resolution quoted above was adopted, and the investigation was made by one committee following the precedent established in 1857. In the course of their inquiry they were confronted with a contumacious witness, John W. Wolcott. The chairman of the committee reported to the House [1] that the committee had found it difficult to make any progress due to the refusal of Wolcott to answer certain questions. He was asked whether he had received any securities at any time during the month of March last to the amount of $30,000 at one time. He replied: "Not for any purpose of that sort" (as suggested in the resolution creating the committee of inquiry). He was then asked, "Did you for any purpose?" He answered, "Well, that would be a matter of strictly private business; I did not for the purpose of influencing members of Congress or their agents." Wolcott claimed that the question was not "pertinent" to the inquiry which the House had a legal right to institute.

Mr. Stanton, the Chairman, recommended that Wolcott be brought before the House to answer for a contempt in refusing to answer a proper and competent question propounded to him by a select committee of this House, in pursuance of the authority conferred by the House upon said committee. Discussion followed this recommendation. Some members of Congress believed the witness had given sufficient answer to the questions of the committee, to go further would be impinging upon his private rights; others said: "Of the pertinency of the question the House is the judge and not the witness." It was also stated in this discussion that it was about time the House established some rule in these investigations.

[1] 35th Cong., 1st sess., *Globe*, p. 684.

The House should either abandon these investigations, or compel the answers of reluctant witnesses. There is hardly a case of investigation where some witness does not attempt to make a hero of himself, and a martyr sometimes. These cases of contumacy are repeated and are becoming more frequent. The time has come now that we have so many investigating committees around us, when the House should exercise all the authority possible for the purpose of making witnesses answer directly and fully all inquiries.[1]

The recommendation was approved and the Speaker issued his warrant to the Sergeant at Arms ordering him to arrest J. W. Wolcott and bring him to the bar of the House.[2]

On his appearance before the House, he was given another chance to answer the question, but he still declined, claiming a want of jurisdiction in the committee to compel him to answer that particular question maintaining that it was not pertinent to the inquiry authorized by the House. He stated:

I suppose that no one will maintain that under our form of government . . . it is in the power of Congress, or either of the other departments, to investigate the social relations and private business of a citizen, having no reference at all to or connection with the powers conferred upon them respectively. The right to hold these sacred from governmental investigation or power is, in very terms secured expressly by the Ninth Amendment, and vested in the citizen.

The House listened to Wolcott's statement, after which Mr. Stanton introduced a resolution, providing for Wolcott's commitment to the common jail of the District of Columbia, until he should satisfactorily answer the questions asked of him. In introducing this resolution Mr. Stanton said the House should act coolly and calmly as the power which he proposed be exercised would probably be tested before the

[1] See *Globe*, p. 684.

[2] *Ibid.*

courts of the country, hence he wished to state some of the principles on which the power was based.

> The power to punish for contempt is a necessary incident to judicial power, without which it cannot be exercised. The judicial power is just as much sovereign and supreme as the legislative or executive. The power to decide controversies between citizens and between the citizen and the state is one of the most important attributes of sovereignty; and the power to decide carries with it the power to inquire, to investigate, to consider; and how can any tribunal inquire and investigate without the power to compel the attendance of witnesses, and to require them to testify? . . . This committee is required to "investigate" certain matters named in the resolution under which it was appointed. And how can it investigate if the House has no power to compel a witness to testify to facts within his knowledge which are indispensable to a proper understanding of the matter to be investigated?

Before the resolution was adopted, it was objected to on the ground that it involved perpetual imprisonment. Mr. Stanton answered the objection by saying: "If the prisoner is in custody when Congress expires, he will be discharged on habeas corpus immediately; the House has no power to punish by imprisonment beyond the present session."

No record, either in the Journal of the House of Representatives or in the *Congressional Globe* appears of the action of the Speaker in certifying the fact of the refusal of said Wolcott to testify before the said committee to the District Attorney of the District of Columbia, as authorized and required by the Act of January 24, 1857. The certificate of the Speaker to the District Attorney of the facts of the case, does not appear as a part of the record in the Supreme Court of the District of Columbia, but from the newspapers of the day, it duly appears that such certificate was made by Speaker Orr, but not reported to the House and entered on

the Journal. Other records show that after Wolcott had served several months in jail, a true indictment was returned against him by a jury of the District of Columbia. Finally on March 17, 1859 a nolle prosequi was entered by the United States District Attorney upon the payment of $1000 and costs by Henry A. Willard, the surety for Wolcott, for said sum.[1]

The final report of the committee, made on May 27, 1858, indicated that Wolcott had received at least $74,000, evidently for the purpose of fulfilling his alleged promises and undertakings, made during the session, to secure the passage of the tariff, also that instead of paying out any of this money he had kept it for his own use. In other words, the evidence taken indicated how capitalists may be fleeced by parties who pretend to be able to exert an influence over legislation through power of which they are wholly destitute. The testimony moreover, showed that not one per cent of the sum expended by Lawrence Stone and Company, ever went into the hands of a single member of Congress. However it was proved that the clerk of the Committee on Claims had received $1000 in return for his services in influencing the vote of members of the House. He promptly resigned. The committee also believed that the evidence showed that the legislation of the country might be influenced by large masses of capital, concentrated in the hands of a few persons having a common interest, so as to benefit that interest at the expense of the great mass of the people.

However our interest in this case lies in the fact that regardless of the law of 1857, the House imprisoned Wolcott, preferring to exercise its inherent power rather than depend upon the punishment which could be inflicted by statute. It is true that Wolcott was later indicted and punished under the Act of 1857, thus suffering a double punishment for his act of contempt.

[1] See 53d Cong., 2d sess., *Senate Misc. Docs.*, vol. xii, p. 201.

On December 14, 1859[1] the Senate adopted a resolution submitted by Senator James M. Mason of Virginia for the appointment of a committee to inquire as to the facts "attending the late invasion and seizure of the armory and arsenal at Harper's Ferry etc." (known as the John Brown raid). A committee of five was appointed which reported on February 21, 1860[2] that Thaddeus Hyatt had refused to appear before the committee and they recommended that he be brought before the bar of the House (the President of the Senate to issue his warrant to that effect) and to answer as for a contempt of the authority of the Senate. Resolutions to that effect were offered by the committee to the House and after some debate adopted.

In due course Hyatt appeared before the Senate and read a statement, most of which had been prepared for him by counsel, in which it was argued that

the Senate has a right to collect information to aid in legislation, but no right to establish an inquisition for that purpose, that the Senate has no right to compel the attendance of witnesses except in cases where this body is vested with judicial or quasi-judicial functions. The Senate is the sole court to try impeachments, by the express words of the Constitution. Hence it can compel the attendance of witnesses in impeachment trials. It can judge of the elections, qualifications and returns of its own members. Hence when the election of a Senator is contested, it can compel witnesses to attend. So having the power of punishing a member for disorderly behavior, and even of

[1] 36th Cong., 1st sess., *Globe*, p. 848.

[2] The committee had previously reported the refusal of F. B. Sanborn to appear before them, whereupon the Senate ordered the Sergeant-at-Arms to take him into custody. The Sergeant-at-Arms, however, deputed his authority to arrest him to a deputy marshal of Massachusetts. Sanborn, upon being arrested, sued out a writ of habeas corpus in the state court. The writ was allowed by Chief Justice Shaw on the ground that the Sergeant-at-Arms could not depute his authority. Sanborn *v.* Carlton, 15 Gray 399 Mass. (1860).

expelling him, in such cases the right of compelling witnesses follows. But beyond these cases the Senate has no power of compelling witnesses to attend. To compel witnesses to attend before a committee to give information in regard to proposed legislation is a power not given by the Constitution. It is not given expressly and is not given by implication. When we come to committing a witness because he does not appear before an investigating committee who are seeking information preliminary to legislation, then the only ground for sustaining the power is a supposed necessity. However convenient or expedient it may sometimes be to compel a witness to come before a committee like the present, it is never absolutely necessary. Legislation no doubt, would go on just as well without any such power. Take the common case of a question as to altering the tariff. Parties interested will always be found voluntarily to give the required information. It is just so in the present case.

In summary, counsel for Hyatt held that the object of the inquisition was unconstitutional, hence the Senate could have no power to compel the attendance of witnesses before the committee, and that the Senate could not coerce witnesses in inquiries for legislative purposes.

On March 12, 1860 Mr. Mason submitted a preamble and resolutions reciting that the witness had assigned no sufficient excuse in answer to the question, "What excuse have you for not appearing before the select committee of the Senate in pursuance of the summons served on you on January 24, 1860?" And to the question, "Are you now ready to appear before said committee and answer such proper questions as shall be put to you by said committee?" he had not declared himself ready to appear before the select committee and had not purged himself of the contempt with which he stood charged. The resolutions directed that Hyatt be committed to the common jail of the District of Columbia, to be kept in close custody until he should signify his willingness to answer the said questions propounded to him by the

Senate, and for his commitment and detention the said resolution should be sufficient warrant, while a second resolution made provision for his appearance before the select committee whenever he should signify his willingness to answer the questions aforesaid.

A long debate followed the introduction of this resolution which included a discussion of the powers of the Senate to make such an investigation and issue compulsory process. The leading argument against the punishment of the recalcitrant witness was that the Senate could not compel the testimony of a witness in a proceeding, the declared purpose of which was merely legislative. One member said, "You will declare that the Senate, at any time, not merely in the performance of its admitted judicial duties, but also in the performance of its mere legislative duties . . . may drag a citizen from the most distant village of the most distant state and compel his testimony." Senator Sumner of Massachusetts was the leading critic of the exercise of this power by Congress. In a blistering speech he denounced it as tyrannical.

I know that it is said that this power is necessary in aid of legislation. I deny the necessity. Convenient at times it may be, but necessary, never. We do not drag the members of the cabinet or the President to testify before a committee in aid of legislation, but I say without hesitation, they can claim no immunity which does not belong equally to the humblest citizen—such a power as this without the sanction of law, and merely at the will of a partisan majority may be employed to ransack the most distant states, and to drag citizens before the Senate all the way from Wisconsin or from South Carolina . . . may be convenient, and to certain persons, may seem to be necessary. An alleged necessity has throughout all time been the apology for wrong.—So spoke the fiend, and with necessity, The tyrant's plea, excused his devilish deeds.—Let me be understood as admitting the power of the Senate where it is essential to its own

protection or the protection of its own privileges, but not where it is required merely in aid of legislation. The difference is world wide between what is required for protection and what is required merely for aid; and here I part company with Senators, with whom I am proud to act on other matters. They hold that this great power may be exercised not merely for the protection of the Senate, but also for its aid in framing a bill or in maturing any piece of legislation. To aid a committee of this body merely in a legislative purpose, a citizen, guilty of no crime, charged with no offense, presumed to be innocent, honored and beloved in his neighborhood, may be seized, handcuffed, kidnapped and dragged away from his home, hurried across State lines, brought here as a criminal, and then thrust into jail.

The point was also made that this was the first time in the history of the Senate that the attempt had been made to exercise such a power. It was stated that such power had been exercised and sustained in the House of Representatives but,

being the representatives of the popular mind, coming by frequent elections fresh from the people, and filled with the impetuosity of that popular element of which they are the representatives, it is to be expected that they would not so carefully, so calmly, so considerately, and so judiciously weigh these great questions of constitutional liberty applicable to the personal rights of the citizen, as would the august tribunal which is here the representative of the sovereign states.[1]

It was further argued that the resolutions sentenced the prisoner to perpetual imprisonment or until he recanted. As one Senator said, " I think you may search the history of this country, and you will find no precedent where any legislative body in this country, at least, ever undertook to imprison a witness for contempt beyond the period of the session when the order was made."

[1] 36th Cong., 1st sess., *Globe*, p. 1104.

The usual arguments were also made as to the exercise of this power—that Congress did not inherit the powers Parliament had in this respect, and that ours was a written Constitution which said nothing as to the exercise of this power.

Those Senators favoring the adoption of the resolutions and the exercise of this power maintained that the common law of England was adopted by the State and Federal Governments, that while we had a written Constitution with certain powers delegated to the Federal Government, this Constitution left

> undefined powers that we might exercise, in order to accomplish the purpose for which we were created. It told which subjects were within our control; but it did not undertake to tell us the form and manner of proceeding by which we should accomplish the purposes of that legislation. Why? For the simple reason that there was a common law with regard to bodies of this description known to every one, and it was impossible to make a definition that would cover all cases where it might be necessary to exercise these powers known to the common law as parliamentary powers.[1] The principal purpose of the Constitution is to legislate. Now what do we propose to do here? We propose to legislate on a given state of facts. . . . Well, sir, proposing to legislate, we want information. We have it not ourselves. The Senator says ask for it. I am ready to ask for it; but suppose the person whom we ask will not give it to us; what then? Have we not power to compel him to come before us? Is this power, which has been exercised by Parliament, and by all legislative bodies down to the present day without dispute—the power to inquire into subjects upon which they are disposed to legislate—lost to us.[2]

It was also maintained by the proponents of the resolutions that the people have control over Congress, one body re-

[1] 36th Cong., 1st sess., *Globe*, p. 1101.

[2] *Ibid.*, p. 1102.

turning to its constituents every two years, the other body every six years. Senator Fessenden said:

> The people have power over us. There is no danger connected with it; we can do no harm; and therefore I say, Sir, it is well that we should rid ourselves of all these ideas that we are simply a body under a written constitution, appointed simply to legislate, and do certain other acts, and obliged, in the first place, to inquire at every step we take, whether we have any one power which we may deem and find absolutely essential in order to accomplish the purposes for which we were created.[1]

To the argument that the Senate could not summon witnesses from the various states, as the exercise of such power was contrary to the constitutional rights of citizens, it was answered that the Constitution gave Congress power of legislation in certain cases. This power extended throughout the Union. The procedure necessary to enact the legislation authorized by the Constitution was not defined. Hence the House itself must use its discretion and judge of the necessity for the use of the inquisitorial power.

The resolutions were finally adopted by a vote of 44-10, whereby Hyatt was committed to the district jail and he remained there until June 15th, 1860, when the select committee through Mr. Mason made its final report. After the committee had been discharged, the following order was adopted by the House: "Ordered, That Thaddeus Hyatt, a witness confined in the jail of this city for refusal to appear and testify before said committee, be discharged from custody, and that a copy of this warrant be delivered to the jailer by the Sergeant at Arms as his warrant for discharging the said prisoner."

The debates in this case show very clearly the strong opposition in the Senate to an extension of its power to issue compulsory process in investigations to aid in the mak-

[1] 36th Cong., 1st sess., *Globe*, p. 1102.

ing of legislation. The arguments of both sides in this case are identical with those offered in the House debates on the same question in 1827.[1] We should note here also that the Senate paid no attention to the Statute of 1857, but preferred to punish the contumacious witness through the exercise of its inherent power rather than according to the statutes. This case marked the first time the issue had been brought to a head in the Senate. However the Senate adopted the resolution by an overwhelming vote and thus by 1860 both Houses of Congress had asserted and exercised the power to punish for contempt in investigations for legislative purposes, a power which was on the borderline of the implied powers of Congress and its right to issue compulsory process in its investigations.

While President Buchanan "fully and cheerfully" admitted that inquiries which are incident to legislative duties were highly proper and belong equally to the Senate and the House and that they were necessary in order to enable them to discover and to provide the appropriate legislative remedies for any abuse which might be ascertained, yet he protested the power given to the Covode Committee to inquire "not into any specific charge or charges, but whether the President has by money, patronage, or other improper means sought to influence not the individual action of members of Congress but the action of the entire body itself, or any committee thereof." Such an accusation Buchanan said, "extended to the whole circle of legislation, to interference for or against the passage of any law appertaining to the rights of any state or territory. Since the time of Star Chambers and general warrants, there has been no such proceeding in England." He also protested because such an investigation was in violation of the rights of the coordinate executive branch of the government, and subversive of its constitutional independ-

[1] See *supra*, ch. ii, pp. 94-97.

ence. Moreover he claimed such an investigation was a flagrant abuse of a private person's rights under the Constitution, for John Covode who accused the President, was also Chairman of the Committee. "I am to appear before Mr. Covode either personally or by a substitute, to cross examine the witnesses which he may produce to sustain his own accusations against me; and perhaps this poor boon may be denied the President." [1]

Shall the Executive alone be deprived of rights which all his fellow citizens enjoy? The whole proceeding against him justifies the fears of those wise and great men, who, before the Constitution was adopted by the States, apprehended that the tendency of the Government was to the aggrandisement of the legislative at the expense of the executive and judicial departments.[2]

After a short debate on the President's protest his statement was referred to the Judiciary Committee with leave to report at any time. On April 9 following Mr. John Hickman from said committee made a report [3] accompanied by the following resolution, viz.: Resolved,

That the House dissents from the doctrine of the special message of the President of the United States on March 28, 1860; that the extent of power contemplated in the adoption of the resolutions of inquiry of March 5, 1860, is necessary to the proper discharge of the constitutional duties devolved upon Congress; that judicial determinations, the opinions of former Presidents, and uniform usage sanctions its use; and that to abandon it would leave the Executive Department of the Government without supervision or responsibility, and would be likely to lead to a concentration of power in the hands of the President which would be dangerous to the rights of a free people.

[1] 36th Cong., 1st sess., *Globe*, p. 1434.

[2] *Ibid.*, p. 1435. *Cf.* Madison's statement in *Federalist*, p. 219.

[3] See *Globe*, 36th Cong., 1st sess., vol. iii, *H. R. Rep. no. 394.*

The resolution was eventually adopted. On June 25, the President sent another protest to the House claiming that the committee had acted as though they possessed unlimited power, and without any warrant whatever had pursued a course not merely at war with the constitutional rights of the executive, but tending to degrade the Presidential office itself to such a degree as to render it unworthy of the acceptance of any man of honor or principle.[1] The President claimed that the committee had proceeded to investigate subjects not warranted in the resolutions; that it had taken testimony *ex parte;* had dragged private correspondence to light, which a truly honorable man would never have an even distant thought of divulging. Even members of the cabinet were called upon to testify.

> Should the proceedings of the committee be sanctioned by the House and become a precedent for future times, the balance of the Constitution will be entirely upset, and there will no longer remain the three coordinate and independent branches of the government, Legislative, Executive and Judicial. Should secret committees be appointed, with unlimited authority to range over all the words and actions, and if possible the very thought of the President, with a view to discover something in his past life prejudicial to his character from parasites and informers, this would be an ordeal which scarcely any mere man since the fall could endure.[2]

This last protest of the President was referred to a select committee which made a report. There is no question that Congress was firmly convinced and in this case the House, that the power of investigating the President, even where specific charges were not made, constitutionally belongs to the legislative department. The argument made by the Executive in this case only seemed to arouse the ire of the

[1] 36th Cong., 1st sess., *Globe*, p. 3299.

[2] *Ibid.*, p. 3300.

House the more. It is true that the President had some staunch defenders in the House, but the great majority opposed him. This is seen in the vote on the first resolution dissenting from the doctrines enunciated in his first message to the Senate, viz. 87 to 40.[1]

The case marks another illustration of strenuous opposition on the part of the executive to the application of inquisitorial power to the executive department.

In 1861 the two Houses, by concurrent action, assumed without much question the right to investigate the conduct of the War. On December 9, 1861 the Senate agreed to the following:

> Resolved by the Senate, the House of Representatives concurring, that a joint committee of three members of the Senate and four members of the House of Representatives be appointed to inquire into the conduct of the present war; that they have power to send for persons and papers, and to sit during the session of either House of Congress.[2]

The military disasters at Bull Run and Ball's Bluff led to the demand in the Senate for this investigation. Senators were quickly assured by Mr. Grimes of Iowa who proposed the resolution that this is no new proceeding. "Investigations like this are coeval with the Government."[3] He mentioned the investigation of General St. Clair as precedent and declared it the right and duty of the Congress to make the investigation. Some objection was made on the ground that it was an interference with military affairs which was none of Congress's business, that the Executive was amply able to take care of the matter. However this objection was met by the statement that the reputation of certain

[1] 36th Cong., 1st sess., *Globe*, p. 1434.

[2] 37th Cong., 2d sess., *Globe*, p. 29.

[3] *Ibid.*

military leaders was at stake, that this inquiry would reveal the truth of the above mentioned military disasters and in fact the people of the country had no one but Congress to look to for the successful prosecution of the War. Mr. Fessenden of Ohio also said that such an investigation coming at this time would be a gentle hint that the representatives of the people who are carrying on this war deem it their duty to keep a watchful eye over the proceedings of executive agents wherever they be called and whatever may be their position.[1] This device of a joint investigating committee became popular during the Civil War period and was used frequently thereafter. Some of the more important cases will be discussed further on in our study.

The power of the House to take cognizance of assaults on its members and punish such as a breach of its privileges was sustained in the case of William D. Kelley of Pennsylvania who was assaulted in a hotel by Mr. Field of Louisiana. The Louisiana delegation had not been given seats in the House, but had been allowed the privileges of the floor. Mr. Field felt that Representative Kelley was instrumental in checking the progress of the Louisiana delegation to the full privileges of the House, including seats therein. This had preyed on his mind and, coupled with the effect of strong drink, had led him to attack Mr. Kelley. The question was, should the assault be recognized as a breach of the privilege of the House and should Field be punished and how. Before the House got to a consideration of his case, he had been required to appear before a justice of the peace and give bail to answer the charge of assault and battery and to keep the peace towards Mr. Kelley.[2]

The Speaker appointed a committee of five to inquire into the alleged breach of privilege with power to send for persons

[1] 37th Cong., 2d sess., *Globe*, p. 31.

[2] 38th Cong., 2d sess., *Globe*, p. 371.

and papers and to examine witnesses. Before the resolution providing for the appointment of this committee was adopted by the House, a debate ensued in which certain members questioned the power of the House to recognize the assault as a breach of privilege. However a great majority favored the adoption of the resolution, which by amendment suspended Mr. Field from the privilege of the floor until the committee had made its report.

The committee in its report found that Field was guilty of a breach of privilege of the House and recommended that he be reprimanded by the Speaker, and the privileges of the Hall be rescinded in his case. The House approved the reprimand but rejected the second portion of the resolution. This case varies somewhat in procedure from the practice of the Houston case in that the House punished Field after he had been brought to court to answer assault and battery charges, and while his case was pending there.

The liberality with which the privileges of Congress were construed is seen in the case of Representative Charles V. Culver of Pennsylvania. The following preamble and resolution were reported to the House by Mr. Hall of New York:

> Whereas it is alleged that Charles V. Culver of Pennsylvania, a member of this Congress, is detained from his seat in the House under arrest, in violation of the privileges of the sixth section of the first article of the Constitution, and of the privileges of this House; Therefore, Resolved; That the Committee on Judiciary is hereby instructed, with all practicable despatch, to inquire into the circumstances of the case and report the same to this House whether any breach of its privileges has been committed and what action should be had thereon; that the said committee have power to send for persons and papers, to sit during the sessions of the House and to report by bill or otherwise at any time.[1]

[1] 39th Cong., 2d sess., *Globe*, pp. 51, 52.

The resolution was unanimously agreed to and ten days later the Committee on Judiciary reported that they had brought the sheriff and jailor of the proper county, along with Culver himself, and all records bearing on the case, before them. They showed in their report that Culver had been arrested on an action brought against him for the return of certain bonds and notes claimed to have been lent to him, which debt was fraudulently contracted by Culver. On default of required security, he was committed to jail and was there detained until this committee began its investigation.

The next point considered in the report was whether such imprisonment was a violation of the privileges of the House as stated in the 6th section of the first article of the Constitution which provides, that "Senators and Representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective House and in going to and returning from the same." The committee stated that this privilege which was borrowed from the law and custom of Parliament, is "of such high antiquity in England as to be absolutely lost in the night of time, and to stand therefore upon prescription . . . than upon any positive law, though recognized by statute in very early English history." The exceptions as in cases of felony, treason and breach of peace, they found were identical with English practice. With these exceptions however, the committee observed the privileges of Parliament protected the persons of members in every possible case of arrest and so important were these privileges considered that "no man is allowed to plead ignorance of the persons of those who are entitled to them." [1]

In cases in their nature criminal, then, privileges of the legislature were no protection, but in civil cases they were.

[1] See Cushing, *op. cit.*, p. 224.

While it was conceded in this case that Mr. Culver was neither in actual attendance here nor going to or from the seat of government at the time he was arrested, it was shown that he was detained while the House was in session although "it is his duty to be here, as it is the right of Congress and his constituents that he should be, and his power to perform that duty is not to be abridged because he might choose to neglect it." The committee stated in connection with the clause in the Constitution conferring these privileges on members that

> these words are entitled to and have always received a liberal construction, for the benefit of the people, who are the parties interested in the attendance of a member, and the unembarrassed performance of his duties. Indeed, the Parliament itself, which is the sole judge, as it is the zealous guardian, of its own laws, customs and privileges, has always been careful to avoid any precise definition of those privileges lest it might result in an abridgment of them in the future.[1]

The final action of the House was to pass a resolution ordering the Speaker to issue his warrant commanding the Sergeant at Arms of the House to deliver Culver from the custody of the jailer detaining him.[2]

The managers of an impeachment were endowed by the House with the functions of an investigating committee in 1868. In the matter of an impeachment of Andrew Johnson, the Board of Managers in behalf of the House reported the following preamble and resolution:

> Whereas information has come to the managers which seems to them to furnish probable cause to believe that improper and corrupt means have been used to influence the determination of the Senate, upon the articles of impeachment exhibited to the

[1] 39th Cong., 2d sess., *Globe*, p. 225.

[2] *Ibid.*

Senate by the House of Representatives against the President of the United States. Therefore, be it resolved, That for the further and more efficient prosecution of the impeachment of the President the managers be directed and instructed to summon and examine witnesses under oath, to send for persons and papers, to employ a stenographer, and to appoint subcommittees to take testimony, the expenses thereof to be paid from the contingent fund of the House.[1]

About a week later the managers, through Mr. B. F. Butler, submitted a report including a transcript of testimony showing that a witness, Mr. Wooley, had both evaded the committee and declined to answer certain questions as to the receipt and disbursement of money, claiming they were not material. The committee recommended the adoption of a resolution, the effect of which was that the Speaker should issue his warrant to the Sergeant at Arms with authority to bring the witness before the bar of the House, and that he be detained " by virtue thereof by the Sergeant at Arms until he answer for his contempt of the order of the House and abide such further order as the House may make in the premises."

In the debate following the introduction of this resolution the point was made that the witness should be dealt with according to the statute of 1857 rather than by the process proposed by the managers. The Speaker overruled this point of order saying that the uniform usage of the House from the 12th Congress down to the present time has been that where a witness is before a committee of the House, that is, one authorized to send for persons and papers, and refuses to testify, he is first to have an opportunity to answer to that House why he refuses to testify. He can not be held to answer until the committee shall present the question to the House and the House shall, at the bar, through the Speaker,

[1] 40th Cong., 2d sess., *Globe*, p. 2503.

present to him the question and ascertain why he has refused to answer it. With reference to the statute of 1857 which reads: "Shall in addition to the pains and penalties now existing be liable to indictment as for a misdemeanor," he said:

Previous to 1857 there had been no power of punishment except the power of the House of Representatives and that power ended when the House adjourned. If therefore a witness, just at the close of a constitutional term of Congress on the 3d of March, should refuse to testify, the House of Representatives could not imprison him for a longer term than until the 4th of March, when their term expired. This law was asquiesced in by all parties. And it goes on to provide, "When a witness shall fail to testify as above, and the facts shall be reported to the House, it shall be the duty of the Speaker to certify the fact, under the seal of the House to the District Attorney of the District of Columbia."

The resolution was further strenuously objected to on the ground that they were investigating private affairs.

When the committee put questions to a witness relating to his personal and private affairs or private business they are, in my judgment, travelling beyond the parliamentary right of the House in making an investigation, particularly when, as in this case, the witness swears positively he has used none of this twenty or twenty five thousand dollars for any purpose connected whatsoever with the impeachment of the President.[1]

Of course it was the form of the last question which the committee objected to. They would not accept such a qualified answer to their question and demanded to know what had been done with the money, hence claiming they were better judges, and of right too, of the relevancy of their questions and the answers thereto. The committee said

[1] 40th Cong., 2d sess., *Globe*, p. 2579.

through Mr. Butler: "It is not for the witness to say, 'I will not answer, because it is not a proper question.' Judgment must be with the committee in the first instance and with the House in the last." [1]

Further objection was made to the procedure of the committee on the ground that it had no right to criminate the witnesses by the answers it compelled to its questions. The answer to that objection was:

In 1857 a witness [2] put himself upon this privilege in the case of the tariff investigation as to bribery in the case of the tariff law and Congress passed a law that it should be no excuse to any witness that his answer might tend to criminate, and that he should never be indicted as to the subject matter of which he was inquired of. Under that law, Floyd, the defaulting Secretary of War, escaped indictment. Therefore in 1863, Congress altered the law, providing that while the party may be indicted, his answer shall not be given in evidence, and no paper which he produces and no testimony which he gives can be used against him, but he must answer.

Other details in the procedure adopted by the committee were objected to in the House debate on the above resolution. The wholesale demand of the committee for "papers", especially telegrams was denounced; as one member said:

The privileges and prerogatives of this House I know very well, but they are not those of a court of law. They are limited by parliamentary law and precedent. I undertake to say that the whole history of parliamentary law of no country ever showed an invasion like this, and that the surrender of telegrams to this managerial committee is one of the most disgraceful surrenders which has ever been made by a corporation in the whole history of the World, and in my judgment ought to damn them to everlasting infamy.[3]

[1] 40th Cong., 2d sess., *Globe*, p. 2586.

[2] See *supra*, ch. iii, p. 151 and *infra*, ch. v, pp. 302-316.

[3] *Ibid.*, p. 2579.

A member of the committee denied any wholesale seizure of telegrams saying:

> We have done this, which is, in my judgment, exactly according to the law of the land, exactly within the power of this House, exactly within the power of any court of justice; we sent our subpoena duces tecum to the telegraph offices, asked them to bring their telegraph dispatches, and asked the managers of the offices, either at our rooms or at home, to select certain telegrams of parties named or unnamed, as well as we could designate them. We had to make a broad selection as the corrupt rascals engaged in this nefarious business used feigned names. . . . No telegram that does not relate to this impeachment directly or indirectly, has been or will be published to the World. . . . Every government on Earth has always held for itself the right to examine papers for its own protection. . . . We have done no more than may be done by every Justice of the Peace in the country; he may issue his subpoena duces tecum and call for such telegrams as are designated.[1]

The resolution was finally agreed to and Wooley was brought before the House and asked by the Speaker what excuse he had for not answering the questions of the committee and if he was now ready to go before them and answer such questions. Wooley replied by handing in a paper in writing in which he denied he was guilty of contempt of the House, that he had not seen a copy of the report of the committee to the House concerning his case, and that he desired time to consult counsel. Following this the House resolved itself into a Committee of the Whole to attend the impeachment proceedings in the Senate and after some time returned and resumed the session, the Chairman of the Committee of the Whole reporting that Andrew Johnson had been declared acquitted. The question of the contumacious witness was again taken up and Wooley was asked why he did not reply

[1] 40th Cong., 2d sess., *Globe*, p. 2581.

to the questions of the managers. He again answered by submitting a paper in writing claiming that the committee in the course of its examination had transcended his rights and privileges as a citizen under the Constitution; he was not bound by the law of the land to submit to such a scrutiny into his private affairs.

At this point in the proceedings it was suggested that the power of the managers had ceased with the close of the impeachment proceedings, hence could no longer act as an investigating committee. So a resolution was agreed to continuing the managers as an investigating committee. Wooley persisted in his refusal to answer the questions of the committee and was confined in a special room in the capitol under charge of the Sergeant at Arms. Eventually he gave in and purged himself of his contempt by answering the questions of the committee.

This case is very important as it exhibits very clearly the struggle between the private rights of citizens under the Constitution and the public right to information. It shows that the House may endow the managers of an impeachment with the functions of an investigating committee and with the adjournment of impeachment continue them as an investigating committee. This case also brings out some pertinent points with reference to procedure. For example, it holds that a contumacious witness should not be proceeded against for contempt, either before the House or under the law, until he has been arraigned and answered at the bar of the House. A witness imprisoned for contempt before a committee purges himself by stating directly to the House his readiness to go before the committee, and not by testifying to the House. Again this case is important because it provides an interpretation of the circumstances attending the enactment of the law of 1857 for punishing contumacious witnesses. Finally the tendency of both Houses of Congress

to imprison recalcitrant witnesses, regardless of the statutes, is again seen in this case.

The only instance where a person was imprisoned by order of either House of Congress, such imprisonment extending beyond the adjournment of the session, occurred in the case of Patrick Woods. Woods was a police detective in the city of Richmond, Virginia. He assaulted Charles H. Porter, a representative in Congress from that district, on the street, apparently with intent to murder him. Porter was planning to take a train within a few hours for Washington where Congress was in session. However as a result of the attack, Porter was not able to leave Richmond for several days.[1] On his return to Washington, Porter sent a communication to the Speaker relating the facts of the attack on his person, which was read to the House. A resolution was promptly offered to the House to the effect that the Speaker issue his warrant taking Woods into custody of the Sergeant at Arms, subject to further direction of the House. Objection was made to the resolution on the ground that it did not present a question of privilege. The Speaker ruled:

> Any assault on a member which that member in his capacity as such brings to the attention of the House, must be ruled as a question of privilege. The gentleman, Mr. Porter, was absent by leave of the House, and he states that at the time of the assault he was on his return to the House of Representatives for the purpose of attending to his public duties.[2]

The resolution was adopted by a vote of 126 to 40. When Woods appeared before the House in the custody of the Sergeant at Arms, a resolution was proposed to the House, that the matter be referred to the Committee on Judiciary for

[1] 41st Cong., 2d sess., *Globe*, p. 4847.

[2] *Ibid.*, p. 4317.

examination and report to the House as to what action should be taken in the premises, Woods meanwhile to be detained in custody. Two weeks later the Committee brought in its report showing that it had examined Woods, had allowed him counsel and witnesses in his behalf, and embodied their findings in the following resolution:

> That Patrick Woods, now held at the bar of the House to answer for a breach of the privileges of the House, for his offense, be, and hereby, is, ordered to be punished by imprisonment in the jail of the District of Columbia as other criminals are for three months; and that a warrant in due form, under the hand of the Speaker, be issued to the Sergeant at Arms directing the execution of this order.[1]

There was at first considerable opposition to the adoption of this resolution. Its opponents claimed among other things that Woods did not know at the time he struck Porter that he was a member of Congress. It was stated by them that Woods was arrested without warrant, that he was deprived of his liberty without due process of law, that he was subject to be twice put in jeopardy for the same offence. "He has been immured in a dungeon without sentence and refused bail. He is now menaced by cruel and unusual punishment by imprisonment beyond this session of Congress. He is still held in defiance of all those guarantees of personal liberty declared in the Constitution."[2] Further they claimed that Woods should be punished by the courts in Virginia which had already started action against him and that inasmuch as he was bound to appear before said court soon the House had no right to take him out of its jurisdiction. Jurisdiction was denied the House by the opposition in this case on the grounds that the assault occurred hundreds

[1] 41st Cong., 2d sess., *Globe*, p. 4847.

[2] *Ibid.*, p. 5260.

of miles away from Washington and had nothing to do with the session of the House. It was simply a private assault for which there was ample redress in the ordinary courts. The authority and precedent of English practice was denied in this case or in general to Congress.

The House was warned that

it should be known and understood at once whether this House can, in defiance of our Bill of Rights, of Magna Charta, of all the fundamental principles of liberty, exercise all the powers of the judiciary and bring to trial any citizen of the United States before itself, in its own cause, without judge, without jury, without regard to any of the common forms of law in criminal trials. And whether it may, then, of its own unrestrained will, inflict just such punishment as its passions, malignity or caprice shall suggest, even to the deprivation of property, liberty and life. . . . The power to punish contempts by any court or legislative body, even for the purpose of self protection, is a most dangerous and delicate power. The trial is without jury, the law is to be announced, and the facts found by the party upon whom the offense has been committed. The party complaining is virtually the judge on his own case. Nay, more than this, the law is to be made, the penalty declared and the crime defined by the offended party, and all ex post facto. It is indeed a scandal upon our law that contempts and breaches of privileges of the House are not clearly defined in some well considered statute or rule of the House, and the penalties for such offenses announced, so that persons charged may know by what law they are to be tried and what penalties they have incurred.[1]

Most of these arguments were answered by the advocates of the resolution. They contended that this case of assault and battery on Mr. Porter, while returning to the House, was clearly a breach of the privileges of the House, and as such should be punished. They held that this was not a case of

[1] 41st Cong., 2d sess., *Globe*, pp. 5257, 5259.

privilege of the individual member in question, but of the House and the people here represented, or rather

a privilege of the whole people of the United States to be unmolested in the persons of their representatives during the entire session of Congress, so that laws may be enacted by themselves and for themselves through their representatives, without let or hindrance from any man in Virginia or out of Virginia. When by violence and without provocation that privilege is invaded, it is the right and duty of this House to arrest and imprison the offender. That is the law which has been settled for fifty years by the Supreme Court of the United States and so ruled by that court in Anderson v. Dunn. From that day to this the ruling in that case has not been challenged by any accepted authority in America.[1]

To the question whether the jurisdiction so to arrest violators of the privileges of the House extends beyond the walls of the Capitol or District of Columbia, the answer was made that the jurisdiction of the House was coextensive with the limits and jurisdiction of the Republic. As to whether a person could be twice put in jeopardy for the same act, Mr. Brigham of Massachusetts answered by referring to an opinion of the United States Attorney General made in 1834 in the case of Houston[2] as follows:

Proceedings of this sort constitute no bar to subsequent indictment and conviction. The Fifth amendment to the Constitution of the United States which provides that no person shall be subject for the same offense to be twice put in jeopardy of life does not apply to cases of this sort. . . . If this act was also a breach of privilege of the House of Representatives, and a contempt of the House, they had a right to punish him for the contempt independently of the action of the criminal court and vice versa.

[1] 41st Cong., 2d sess., *Globe*, p. 5254.

[2] See *supra*, ch. iii, p. 115.

This opinion was interpreted to mean that the House might rightfully interrupt for the time being the action of the courts of Virginia, or of any state, or of the United States to punish a breach of its privileges, although the act was also a crime against the laws.

With reference to the argument that ours was a government of limited powers and we must point to explicit written authority for punishing breaches of the privileges of the House answer was made by reference to the decision of Anderson v. Dunn and writers like Story, Kent and Rawle, that among the implied powers of each House, necessary to the existence of the legislative branch of the government, is the power to punish breaches of its privileges.

The resolution was finally adopted and Woods was sentenced on the 7th of July to spend the next three months in the jail of the District of Columbia. The House adjourned on July 15th, but Woods nevertheless served out his term.

The question arose in 1871 of the power and procedure of joint committees of investigation. In this year Mr. John Scott from the Joint Committee on the Condition of the Late Insurrectionary States reported that two witnesses had failed to appear or answer certain questions pertinent to the inquiry.[1] This joint committee had issued its subpoena and Saunders, one of the witnesses, having appeared before a subcommittee of the joint committee and refused to testify, the joint committee reported a resolution to the House providing for the arrest of Saunders by the Sergeant at Arms of the Senate and his appearance before that body to answer for his contempt. The propriety of this proceeding was questioned.[2] Mr. Scott stated that the committee knew of no precedent to guide them, that no case had occurred in which witnesses had been reported as failing to appear be-

[1] 42d Cong., 2d sess., 2 *Globe*, p. 24.

[2] *Ibid.*, p. 25.

fore a joint committee of Congress. "All cases of that character have heretofore occurred before select committees of one of the two Houses of Congress, or before some of the standing committees of the respective Houses." Mr. Scott said the committee had conceived the contempt to be against the whole body of Congress and that it would be proper and within the power of the two Houses to authorize one House to deal with the witness. A motion was made to amend the resolution offered by Mr. Scott by making it a single resolution of the Senate instead of a concurrent resolution.

In support of this amendment it was argued that each body of the members composing the joint committee was the representative of its own House, and therefore that any contempt of the committee transmitted itself to the rights and powers of the two Houses separately. The two Houses possessed individually the power to punish. This power was independent in each, and each having it, no action of the other was necessary to enforce it. If the power to punish was only a concurrent power, then neither House could delegate it, but it must be exercised by both Houses concurrently.

The original form of the resolution merely amounted to the Senate's asking the consent of the House of Representatives to punish a contempt against itself. A punishment in the Senate would not be a bar to subsequent punishment in the House. If the Senate required the aid of the House to lay hold on the witness, the Senate's powers would be too slender to deal with him after arrest. Both the law and the Constitution gave to each House separately the power to punish for refusal to testify, but gave no such power to the two Houses acting together. A joint committee had not the power with regard to witnesses possessed by the select committee of the single House.

On the other hand it was urged that the offense was against the two Houses jointly, that the Act of 1857 did not apply

to such cases, that as the committee was constituted by the joint action of the two Houses, it was proper for the arrest to be made under the same authority, and there could be no harm in a trial by the Senate as it was admitted that the Senate had the right to try on its own account, but that trial should be by the consent of the other House, because the two Houses might differ on the matter.[1]

Mr. Scott showed that precedents were rare on the matter, because joint committees had been in so little favor in the English Parliament that none had been appointed since 1695.[2] The amendment was finally rejected and the resolution adopted. However it does not appear that any further action was taken.[3]

In spite of the difficulties which the joint committee had in the case described above, Congress has used this device for purposes of investigation at least a dozen times since 1871. The subjects investigated show that it has been most frequently used to deal with matters of wide national concern where there was need for the initiation of important legislation. For example, by a resolution of February 5, 1874, a joint committee was instructed to inquire into the problem of taxation for public improvements in the District of Columbia. The committee was given the power to send for persons and papers. Its report of June 16, 1874 disclosed inefficiency and lack of supervision in the District and recommended a new structure of government.[4]

Section 14 of the Appropriation Act of June 18, 1878, (20 Stat. 145, 152) recommended the appointment of a joint committee "to take into consideration the expediency of transferring the Indian Bureau to the War Department."

[1] 42d Cong., 2d sess., 2 *Globe*, p. 37.

[2] *Ibid.*

[3] *Ibid.*, pp. 38, 40.

[4] 43d Cong., 1st sess., *Sen. Rep. no. 453*, Ser. No. 1590.

The committee was appointed and given power to send for persons and papers. Its report recommended sweeping changes in the administration of Indian affairs.[1]

A very important investigation was made in 1910 by a joint committee of the Department of the Interior with especial reference to reclamation and disposal of the public lands.[2] The procedure for punishing contumacious witnesses as outlined for this committee seems to have solved the problem which puzzled the joint committee in 1871. The provisions for punishment were as follows:

> In the case of disobedience to a subpoena this committee may invoke the aid of any court of the United States or any of the territories thereof, or of the District of Columbia, or of the District of Alaska, within the jurisdiction of which any inquiry may be carried on by said committee in requiring the attendance and testimony of witnesses and the production of books, papers and documents under the provisions of this resolution. And any such court within the jurisdiction of which the inquiry under this resolution is being carried on may, in case of contumacy or refusal to obey a subpoena issued to any person under authority of this resolution, issue an order requiring such person to appear before said committee and produce books and papers if so ordered and give evidence touching the matter in question, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

In addition the resolution provided for punishment according to the statutes. This mode of compelling testimony avoided the troublesome question whether the contumacious witness should be punished by the House or the Senate.

Similar provisions for punishment were adopted by an Act of Congress of July 20, 1916, which authorized a joint

[1] 45th Cong., 3d sess., *Sen. Rep. no. 693,* Ser. No. 1837.

[2] 61st Cong., 3d sess., *H. J. Res. 103,* 1910, 1911. See also *Senate Doc. no. 36,* "Investigation of Interior Department and Bureau of Forestry."

committee of the Interstate Commerce Committee of the Senate and the House Committee on Interstate and Foreign Commerce to investigate the whole field of government control of interstate and foreign commerce.[1] Again in 1924 by Act of June 5, a joint committee was authorized to investigate land grants to the Northern Pacific Railroad Company and was given the same powers to compel the attendance of witnesses.[2] In this connection it is interesting to note that the powers of punishment granted to these committees are similar to those of the Interstate Commerce Commission.

Returning to our consideration of cases of compulsory investigation and punishment for contempt arising in either House of Congress, we find a more reasonable and careful interpretation of the power to punish for contempt in the case of W. Scott Smith which came up in the House in 1870. On June 10th, 1870 Mr. Thomas Fitch of Nevada submitted the following resolution: "Resolved, That W. Scott Smith, the reporter of the *New York Evening Post,* be brought to the bar of the House to show cause if he can, why he should not be expelled from the reporters' gallery for libellous statements reflecting upon the integrity of the members of this House." [3] Protest was made, on the adoption of this resolution, that it was not exactly right for a member of this House, without investigation, without reference to a committee, or any report thereon, on his own statement, to get up in the House and insist that because he had been informed, and believed that this man had done wrong, he should be brought without investigation to the bar of the House. "Would it not be better to refer the matter to a committee first?" [4] In answer to this objection reference

[1] 39 Stat. 387 (1916).

[2] 43 Stat. 461, 462 (1924).

[3] 41st Cong., 2d sess., *Globe,* p. 4315.

[4] *Ibid.,* p. 4315.

was made to the precedent in the case of Houston and Duane, who were brought directly before the House and the Senate, respectively, without the intervention of a warrant. The resolution was adopted.[1]

After Smith was brought before the House, the above resolution was read and he was asked to make answer. He did, in writing,[2] claiming his information came from official documents. He was asked where he had received the documents, whereupon the Speaker ruled that it was not in order, "to compel Smith to answer inquiries not within the purview of the order which brought him here."[3]

Several suggestions were made as to proper procedure after which the following resolution was offered and adopted: "Resolved, That the charges and resolution of expulsion against W. Scott Smith, the prisoner at the bar of this House, be referred to a select committee of five members, to be appointed by the Speaker, who shall have power to send for persons and papers and examine witnesses under oath, and may report at any time."[4]

The committee in its report[5] exonerated the Congressmen who were held in suspicion of bribery by the newspaper articles. In considering the resolution for the expulsion of Mr. Smith from the reporters' gallery, the committee said:

> The question of the legal rights and liabilities of conductors of the public press comes properly under consideration. The law on this subject has kept pace with the advance of free principles in other respects. A free press is the life of a free government. The representatives of the people are but their servants and agents and it is of the highest importance that they

[1] 41st Cong., 2d sess., *Globe*, p. 4316.

[2] *Ibid.*, p. 4318.

[3] *Ibid.*, p. 4320.

[4] *Ibid.*, p. 4322.

[5] 41st Cong., 2d sess., *House Report no. 104.*

have means of information as to the conduct of their representatives upon all matters of public concern. In former times the publication of proceedings of judicial tribunals and parliamentary bodies were not privileged if they reflected injuriously upon private character, but the law is now settled that such reports are entirely privileged, provided they are fairly and honestly accurate. In a very recent case against the publisher of the London *Times*, the present Lord Chief Justice of England in delivering the judgment of the Court said, the law of libel has only gradually developed itself into a satisfactory form, for the liberty of a public writer to comment upon conduct and motives of public men has only recently been recognized. Comments on government, on ministers, and officers of state, on members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago, would have been the subject of ex officio information and would have brought down fine and imprisonment upon authors and publishers. Yet who can doubt that the public are gainers by the change, and that though injustice often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion thus freely brought to bear on the discharge of public duties?

The committee showed that the newspapers had a rather weak foundation for statements objected to, but it was their belief that a rule somewhat less strict than an action or prosecution for libel should be applied in this case and, while they felt that Smith had not been without fault, they were "also of opinion that his fault is not of such a serious character as to justify his expulsion from the gallery or even to warrant any formal resolution of censure" and hence recommended that the resolution referred to them be laid on the table.

One of the most important cases involving the power of the Senate to punish recusant witnesses was that of Z. L. White

and H. J. Ramsdell.[1] This case is especially important in our study because it includes an extended discussion of the powers of the Senate in respect to its authority to continue imprisonment beyond the existing session, on the principle that the Senate is a continuing body, unlike the House of Representatives.[2]

On May 12, 1871 the following resolution was adopted: Resolved,

That a select committee of five Senators be appointed by the Chair, who shall investigate how, and by whom, the treaty known as the Treaty of Washington and other recent proceedings of the Senate in executive session were made public, and that said committee have power to send for persons and papers.[3]

On May 16 this committee reported to the Senate that in its inquiry it had met with two recusant witnesses; Mr. Z. L. White, a correspondent of the *New York Tribune* had somehow with the aid of his assistant, Mr. H. J. Ramsdell, obtained a copy of the proposed Treaty of Washington with Great Britain, which the Senate was considering in executive session, and had transmitted it to the *Tribune,* where it was published. When White was asked by the committee where he had obtained this treaty or from whom, he refused to answer, claiming that "on account of his professional honor, viz. whenever he received any items of news unless he had the permission of the gentlemen or person who furnished it to him, he considered it an honorable thing that he should not divulge the source of such news." Ramsdell also refused to answer on those grounds. The committee, after consideration, were unanimously of the opinion that the

[1] 42d Cong., 1st sess., *Globe,* p. 846.

[2] See Case of Hyatt, *supra,* ch. iii, pp. 161-167; and Woods, *supra,* ch. iii, pp. 180-184.

[3] 42 Cong., 1st sess., *Globe,* p. 846.

questions they refused to answer were pertinent and proper, and warned them that unless they did answer they would be subject to proceedings for contempt. They still refused to answer, so the committee reported the facts of their refusal to the Senate with recommendation that they be detained by the Sergeant at Arms until they made proper answers.[1] A lengthy debate immediately ensued. In a preliminary statement, Mr. Carpenter, a member of the select committee, said:

The power of the Senate in regard to such an investigation is twofold, first, The Senate may inquire how, when, and in what manner, and under what circumstances, and by whom, such publication was made, for the purpose of dealing with any offending Senator, if any has offended, or with any officer of the Senate, who has been delinquent and, apart from the power of punishment, the Senate has the undoubted right, which is inherent in every legislative body, to investigate any matter or thing, which may call for legislation, to investigate the conduct of officers of any department of government, to determine whether any legislation be necessary to prevent similar misconduct in the future.[2]

With reference to the refusals of the witnesses to answer the questions of the committee, Mr. Carpenter said:

By the common law a witness may refuse to answer any question in a judicial proceeding where his answer could criminate himself, and according to some authorities, where his answer would disgrace him and render him infamous. But in view of the importance of legislative investigations, and because the rights of individuals must yield when they conflict with the rights of the public, the act of Congress has provided that a witness called before a committee of either House of Congress shall not interpose this privilege, but that he shall answer any question, though the answer may tend to disgrace him or render

[1] 42d Cong., 1st sess., *Globe*, p. 847.

[2] *Ibid.*, p. 850.

him infamous, the act providing however that such testimony shall not be used in any criminal proceeding against him. In other words the act of Congress deprives the witness in such a case of all the privileges secured to him by the common law and compels him to answer every pertinent question without regard to the effects of his answer upon his own reputation.[1]

So Mr. Carpenter held that the witnesses had no right to refuse to answer the questions of the committee.

On the other hand it was said that this proceeding meant that unless the witnesses purged themselves before the Senate, they would be held in contempt and punished for such. However, the opposition claimed the Senate did not have the power of punishing for contempt since the enactment of the statute [2] makes it an indictable offense for a witness to refuse to answer proper questions when put to him by the Senate or one of its committees." If the Senate should punish for this contempt it would bar an indictment in the District Court, for the Constitution says in plain terms that no person shall be twice put in jeopardy for the same offense."

The answer to this objection was:

The statute referred to by the Senator from Ohio in words provides that that trial and punishment provided for in the first section shall be " in addition to the pains and penalties now existing." It is therefore apparent on the face of the statute that it was not the intention of that statute to take away from this body the power to do anything it could have done in such a case as this if that statute had not been passed.[3]

The resolution was adopted and White was brought before the Senate and questioned. He still refused to answer the questions propounded to him by the committee as did Ramsdell.

[1] 42d Cong., 1st sess., *Globe*, p. 851.

[2] Act of 1857. See Appendix B, pp. 432-435.

[3] 42d Cong., 1st sess., *Globe*, p. 853.

Thereupon a resolution was offered, which would commit the witnesses to the jail of the District of Columbia until they had answered the questions of the committee, and which provided further that "said committee shall be continued during the recess following the present session, and are hereby authorized to sit during the recess, with all the powers conferred by the original resolution of the Senate under which said committee was appointed."

Immediately an extended debate followed as to the powers of the Senate to commit after the session expired. Some said there was no doubt that if the above motion prevailed, the effect of it would be to say to the witnesses that they shall be discharged from custody as soon as the session adjourns, which will be in a week or ten days. "It is a familiar principle of parliamentary history that the power of a legislative body to commit expires with the session, and now for the first time we have a device to prolong that power."

Reference to English parliamentary practice was made by the opposition to the above motion and it was shown that the House of Commons did not have the right in any case to imprison a contumacious witness beyond the adjournment. While the House of Lords did imprison a witness for contempt beyond the term of the legislative session this body was distinguished from the House of Lords in that the latter had perpetual existence as the highest court in England. But the Senate is not like the House of Lords as it does not have perpetual existence. Neither does it act like a court as does the House of Lords. Rather, it was pointed out, the Senate drew most of its precedent from the House of Commons. Moreover the opposition said there was no precedent in Congressional history for the exercise of such a power except in the case of Woods,[1] which was clearly illegal.

[1] See *supra*, ch. iii, p. 180.

On the other hand it was contended that the power to punish for contempt existed as long as the contempt lasted, that is, until the witness answered the question put to him and hence Congress or the Senate could imprison the witness until he did answer and might appoint or prolong the existence of a committee to hear that answer after it had adjourned. The opposition to the motion admitted that the Senate could appoint a committee to sit during recess and take testimony but that this committee could not punish for contempt; only the Senate could do that on facts certified to it by the committee.

After some further debate an amendment was offered to the last resolution providing for the discharge of the witnesses. There was immediate objection to this on the score that the

> Witnesses could not discharge themselves by a general statement such as they made. In other words the witnesses merely offered to declare on oath that they had not received the Treaty directly or indirectly from any Senator or an officer or employee of the Senate. To accept such a statement would be to leave to the witness the right of deciding the case. The duty of the witness is to furnish the facts upon which some other party, either the court or the jury as the case may be, shall render a verdict or a judgment.

Those favoring the resolution claimed that inasmuch as the Senate could not punish the witnesses by imprisonment after the adjournment of the session, they might as well discharge them at once and in the meantime the Vice President could certify the facts of the contempt to the district attorney of the District of Columbia, where the case could be disposed of according to the statute of 1857. They also made general protest to the exercise of the inquisitorial power of the Senate. For example, Mr. Sherman of Ohio, said:

This Senate chamber has no power in the Constitution or the laws, to hunt up, investigate, accuse and indict citizens of the United States. We may enforce our rules, even to the penalty of expulsion; but we have no right to indict, accuse, and arraign any citizen of the United States and I believe that when these witnesses had disclosed sufficient to show that no Senator had violated the trust reposed in him by his position, that no officer had violated his duty, there the matter ought to have stopped.[1]

Still others said the Senate was a body created by a written constitution, having certain enumerated powers, hence unlike Parliament in England. The Constitution says nothing about contempt or punishing for contempt. In the case of impeachments, the Senate becomes a judicial body, and it is reasonable to infer that it may have the power to compel the attendance of witnesses, in short, the powers of a court. The Senate also has, by express terms of the Constitution, the power to expel a member. There again is an inquiry judicial in its nature and should the Senate on such occasions examine such witnesses and proceed as a court it may be inferred that it is so authorized by the Constitution. There is also a third power which the Senate possesses, judicial in character. It is to determine the election of its members.

Beyond these it was claimed every power that the Senate undertakes to exercise on this subject is derived by inference. It does not stand on any text of the Constitution. It is a mere implication, and being adverse to the rights of the citizen, it must be construed strictly. Senator Sumner maintained "that the Senate does not possess the power by compulsory process to compel witnesses to testify in aid of legislation, as was once attempted in what was known as the Harper's Ferry investigating case." [2]

[1] 42 Cong., 1st sess., *Globe*, p. 902.

[2] See *supra*, ch. iii, pp. 161-167.

The following resolution was finally adopted: "Resolved, That the Sergeant at Arms of the Senate be and hereby is, directed to discharge Z. L. White and H. J. Ramsdell, now held in custody by him under an order of the Senate, immediately upon the final adjournment of the present special session of the Senate." [1]

An analysis of this case shows the Senate's doubt of its power to hold a witness longer than the adjournment of its session. While it finally decided against such power and virtually repudiated the action of the House in the Woods case, yet it is significant that a resolution was offered in the Senate asking that the Judiciary Committee be instructed to inquire into the powers of the Senate to imprison a witness refusing to answer a proper question, and especially whether imprisonment in such case could extend beyond the session of the Senate which ordered the imprisonment.[2] No action was taken on the resolution and from the *Globe* it is not apparent whether any further proceedings were conducted against the two recusant witnesses by the district attorney of the District of Columbia according to the statute of 1857.

The same doubt that existed at the time of the adoption of the Constitution as to the powers of these committees of investigation, was still seen in the debates, and the exercise of power contemplated in the above case was declared unconstitutional, a denial of due process, based on mere inference and a star chamber proceeding. On the other hand the admission was freely made that such power was a denial of a person's liberty, but such denial was necessary in the interests of the public welfare. It is significant that all of the first ten Amendments to the Constitution which place limitations on governmental power to deprive a citizen of his freedom were

[1] 42d Cong., 1st sess., *Globe*, p. 929.

[2] *Ibid.*, p. 929.

not held applicable in proceedings of this sort. It is small wonder that certain legislators feared such a power, "based on inference and not confined by constitutional limitations."

One member of the Senate put the problem very well:

> But here is a question between the consequences which come to an individual by maintaining what he calls his honor and the benefits which are to result to the public by adhering to a rule which has the binding force of law and is adopted for the interests of the public. . . . I think public justice should outweigh the feelings and privation of the individual, and he is under obligation to the public to yield his opinion to the demands of law.[1]

Accusations in the public press that certain members of Congress were possibly guilty of bribery in connection with the construction of the Union Pacific Railroad and the organization of the Credit Mobilier naturally led to the demand for an investigation and hence a resolution was adopted by the House, providing for the appointment of a select committee of five members, "whose duty it shall be to investigate and ascertain whether any member of this House was bribed by Oakes Ames, or any other person or corporation, in any manner touching his legislative duty."[2]

On January 6, 1873 a resolution was proposed in the House that the committee appointed above be directed "to continue such investigation, without secrecy as to either their past or future proceedings, and that the testimony hitherto taken be made public." It seems that due to the many distorted reports of the testimony taken before the committee one John B. Alley, former Congressman, had had his life threatened. He had been reported as testifying to certain facts before the committee, when as a matter of fact, he had not yet appeared before the committee. In com-

[1] 42d Cong., 1st sess., *Globe*, pp. 920, 921.

[2] 42d Cong., 3d sess., *Globe*, p. 514.

menting on this resolution, Mr. Poland, chairman of the select committee, said that the committee had been advertised by the newspapers as adopting a course somewhat unusual, namely, taking testimony in secret and conducting their investigation behind closed doors, when really not an instance in congressional proceedings had occurred where an investigation of this sort had been conducted in any other way. He stated that newspaper reporters had been excluded from the committee room but the committee had its official reporter present "who wrote down everything that has been said by anybody and whenever we shall get through, that testimony shall be reported to this House to be made just as public as this House shall deem it proper to make it."[1] Witnesses summoned before the committee have had the benefit of counsel and right of cross-examining other witnesses and altogether the committee has pursued the ordinary and usual course in relation to investigations of this kind.

Further, point was made that such conduct of investigations was governed by the rules of the House, which rules were to a great extent those laid down in Jefferson's Manual; hence this work was cited as follows: "The proceedings of a committee are not to be published as they are of no force till confirmed by the House." Of course this rule could be suspended and a new one adopted by the House and it was exactly this which was contemplated in the resolution above. The resolution was adopted and the rules suspended which action was not only a reversal of the unbroken practice in respect to congressional investigations since the formation of the government, but a departure from the settled and established principles of the common parliamentary law of England, as well as of this country, in regard to the ordinary proceedings of legislative committees.[2]

[1] 42d Cong., 3rd sess., *Globe*, p. 514.

[2] *Ibid.*, p. 355.

A second House committee (the Wilson Committee) was also appointed to investigate thoroughly the financial arrangements of the Credit Mobilier and Union Pacific Railroad. Eventually both committees brought in reports condemning the practices of the Credit Mobilier, and the first committee (the Poland Committee) recommended the expulsion of two Congressmen as being guilty of bribery. This resolution was amended by a substitute which "condemned the conduct of the Congressmen etc." In the discussion of this report in the House an interesting question arose as to the power of the House to expel a member for offenses committed by such member long before his election thereto and not connected with such election. The majority seemed to think that the House did have such power.

The Wilson Committee in its report, found persons connected with the Credit Mobilier holding bonds illegally and it suggested that an act be passed by Congress ordering the Attorney General of the United States to institute a suit in equity against the Union Pacific and the Credit Mobilier in order to eliminate financial dishonesty.

In the course of the investigation made by this committee Joseph B. Stewart, a counsel for the Union Pacific R. R., refused to answer certain questions. The committee reported his refusal to the House, whereupon the Sergeant at Arms was ordered to take into custody the person of J. B. Stewart and produce him forthwith at the bar of the House.[1]

He was brought before the House and the Speaker asked him if he was now ready to answer the questions of the committee. In an eloquent speech over an hour in length,[2] which bored considerably certain members of the House, he persisted in his refusal to answer the questions of the committee on the ground that so to do would violate confidences entrusted to him by his client.

[1] 42d Cong., 3d sess., *Globe*, p. 982. Proceedings of January 30, 1873.
[2] *Ibid.*

However his refusal to answer was promptly voted a contempt of the House and after considerable debate, most of which dealt with the place of his confinement, the following resolution was passed: Resolved,

That, in purging himself of the contempt for which Joseph B. Stewart is now in custody, the said Stewart shall be required to state forthwith, or as soon as the House shall be ready to hear him, whether he is now willing to appear before the committee of this House to whom he has hitherto declined to make answers, and make answers to the questions for the refusal to answer which he has been ordered into custody, and if he does answer that he is ready to appear before said committee and make answer, then the witness shall have the privilege to so appear and answer forthwith or as soon as the said committee can be convened, and that in the meantime the witness remain in custody; and in the event that said witness shall answer that he is not ready to appear before said committee and make answer to the said questions so refused to be answered, then that said witness be remanded to the said custody for the continuance of such contempt, and that such custody shall continue until the said witness shall communicate to this House, through the Speaker, that he is ready to appear before the said committee and make such answers, or until the further order of the House in the premises.[1]

Here is another example where the House punished a contumacious witness by imprisonment regardless of the statute of 1857. In fact nothing was said about the statute during the debate nor did the Speaker make any move to certify the facts of the witness's contumacy to the district attorney. Mr. Blaine, the Speaker, later regretted this saying in the case of Richard B. Irwin that the statute had not

[1] Note: Stewart was confined in a room in the Capitol rather than in the common jail of the District of Columbia, and apparently had a very good time, in fact he became the lion of the Capitol. See remark of Wm. Roberts, made in debate on Irwin's case. 43d Cong., 2d sess., *Record*, pp. 293-295.

been brought to his attention and that he had suffered criticism for not certifying the facts of contumacy to the district attorney, and that he regarded it as his duty to do so unless otherwise ordered by the House.[1]

Stewart's case is also of special interest here as he later brought suit against the Speaker, Mr. James G. Blaine, for false imprisonment.[2] The court, however, held that the House had power to commit for the alleged contempt and dismissed the suit.

Part of the evidence taken by the Poland Committee contained matters affecting the Senate, hence a copy of the evidence taken by the committee was reported to the Senate by the Clerk of the House. The Senate then appointed a committee of five members to investigate any charges contained in said evidence. Some three weeks after receiving the evidence this committee brought in a report recommending the expulsion of Senator J. W. Patterson. The report was not acted upon during the session but later, in a special session, the report was ordered to be reprinted and the order of expulsion against Patterson dropped.

Just at the close of the 42d Congress a charge was made that the Pacific Mail Steamship Company had procured a subsidy by corrupt means.[3] The House directed the Committee on Ways and Means to investigate the charge, but in pursuing their investigation the committee were unable to secure the attendance of the agent of that company who advocated the passage of the measure in Washington and the investigation fell through. It appears that the committee could not find the witness. At the beginning of the 43d Congress, the committee again took up the investigation. A subpœna was sent out for Irwin, who was finally found. He

[1] See *Record*, 43 Cong., 2d sess., pp. 295, 296.

[2] Stewart *v.* Blaine, 1 McArthur 453, explained *infra*, ch. vi, pp. 349-350.

[3] 43d Cong., 2d sess., *Record*, p. 62.

begged a few days' respite before answering the subpoena, claiming that he was sick. The committee, however, suspected that he was trying to gain time in which to make a get-away and reported the facts to the House. A resolution was agreed to by the House directing the Speaker to issue his warrant directing the Sergeant at Arms to take into custody the body of R. B. Irwin, wherever to be found and to have the same brought forthwith before the House to answer for contempt of the authority of the House in thus failing and neglecting to appear before said committee. On December 21, the chairman of the committee, Mr. Dawes, reported a resolution directing that Irwin be discharged from the custody of the Sergeant at Arms as he had appeared and given satisfactory reasons for his delay in appearing. On the same day, however, Mr. Dawes reported another resolution citing that the witness, Mr. Irwin, had refused to answer certain questions propounded by the committee and that "it is necessary for the efficient prosecution of the inquiry that said questions should be answered, and that there is no sufficient reason why the witness should not answer the same, and that his refusal is in contempt of the House."

The House then debated a resolution providing for the appearance of Irwin before the Speaker to show cause why he should not be punished for contempt.[1] Point was made in the debate that the House should proceed as the Act of 1857 provided and that it had no further power than this in the premises. At this point the Speaker raised a question about his duty under the Statute of 1857, saying:

> The statute appears to be mandatory in imposing this duty. In the case of J. B. Stewart two years ago it was not done and there was some criticism in consequence. The attention of the Chair was not called to the precise language of the statute in that case until some time afterward. . . . The chair has brought

[1] 43d Cong., 2d sess., *Record*, p. 178.

the matter to the attention of the House simply for the reason that in previous cases, it may have been overlooked or neglected. As he reads the statute, the duty seems to be mandatory upon him officially, and unless otherwise instructed by the House he will perform it.[1]

It was argued in the ensuing debate that the performance of the duty by the Speaker could in no way interfere with the action of the House thereafter, that although the witness might be indicted in a court of the District of Columbia, there would be no power on the part of any such court to take him out of the custody and control of the House of Representatives.

Mr. B. F. Butler was most vehement in denying the power of Congress to punish for contempt saying that

> the Constitution has given the House certain powers and one is, the power of impeachment, and in the exercise of that power we have a right to all the incidental powers necessary to carry it out. We are, then, the grand inquest of the nation. Then we have the power of punishment for contempt, and can do all the other acts necessary to the ascertainment of the truth, but where in the Constitution do you find this new fangled mud machine, called an investigation in which no man's character is safe, in which no rules of evidence prevail or are for a moment observed? In the Committee on Ways and Means last session, such questions as these were asked about myself; Did you ever hear a rumor that he did so and so? Was there not some talk in the city about it? And there was some miserable newspaper talk that they could see my coattail going out of the committee room.[2]

That this power of investigation was not granted in the Constitution, that parliamentary procedure and the common law of England did not apply to Congress, a body of enumerated powers, was also maintained.

[1] 43d Cong., 2d sess., *Record*, pp. 295-296.

[2] *Ibid.*, pp. 179, 180.

On the other hand, Mr. Lawrence of Ohio said:

Mr. Speaker, this is an important question, affecting the powers of this House, the rights of citizens, and the interests of the country. . . . Has this House, by the common parliamentary law, the power to punish for contempt? Now there are two classes of powers, those which are conferred by express provision of the Constitution and those which are incidental. No man doubts but each House of Parliament has power to punish for contempt. It is a power long exercised, declared by all writers on the British Constitution, and denied by no one. When our Constitution confers on Congress, as it does in the very first section of the first Article, all legislative powers therein granted, there is given to Congress the incidental power to ascertain every fact necessary to enable it to legislate intelligently on every subject within its Constitutional jurisdiction. The power to punish for contempt is not an incident on an incident. It is only the necessary part of the one incidental power. That power has been exercised from the foundation of the government up to the present time, and it has never been doubted or denied until this day. . . . The Constitution in creating a House of Representatives intended to give it the same incidental powers within its jurisdiction as the House of Commons had in that country, from which we derive so much of our constitutional, parliamentary and other law.[1]

Summarizing then he claimed that the House had the power to punish for contempt and that its constitutional basis was found in that clause which confers legislative power and is an incident of that power.

With reference to that clause of the Constitution which prohibits any person from being twice put in jeopardy of life or limb because of any offense, the argument was made that it had no reference to the exercise of common parliamentary power by the House of Representatives. It relates only to the administration of criminal justice, and to those crimes

[1] 42d Cong., 2d sess., *Record*, p. 181.

which are classified by law as crimes, and which may be punished in the courts.

The debate was concluded by a speech of Mr. Dawes who said: "The House is under the Constitution, a grand inquest, with power to govern itself in all matters pertaining to the just and fair exercise of its powers. The House has never stripped itself of the power, but has repeatedly punished for contempts of this power." It was further contended by Mr. Dawes that the Act of 1857 did not take away the common-law right of the House to punish.

The resolution was adopted and on January 6 Mr. Irwin was arraigned at the bar of the House and questioned by the Speaker. He was asked if he was ready to answer the questions addressed to him by the committee. He replied, "No," and was then allowed to make a statement in which he contended that the questions asked him pertained to the character of his transactions with other persons not under the control of the House and such questions were not proper and were outside the jurisdiction of the House. A resolution was then adopted after his continued refusal to answer, directing that Irwin be remanded to the custody of the Sergeant at Arms to abide the further order of the House, and to be taken before the Committee on Ways and Means should he declare himself ready to answer such questions as may be lawfully put to him, including those asked him by order of the House, and while he shall so remain in custody the Sergeant at Arms shall keep the witness in his custody in the common jail of the District of Columbia.[1]

Some days later the Sergeant at Arms notified the Speaker by letter that a writ of habeas corpus had been served on him

[1] *Ibid.*, pp. 471, 472. Jan. 14, 1875. Note: There was an extended debate in Irwin's Case as to whether he should be imprisoned in the common jail of the District of Columbia or in a room in the Capitol. It was finally decided to put him in the common jail of the District of Columbia as was done in the case of Simonton and Wolcott.

directing him to produce the body of Irwin before Judge McArthur of the Supreme Court of the District of Columbia. There was some discussion in the House over this proceeding, some claiming it had never been done before, that what one court considered a contempt could not be reviewed by another court. Other members took a milder view and the Sergeant at Arms was ordered by a resolution of the House to appear in court with the prisoner.

In considering the case Mr. Justice McArthur made a preliminary statement in which he admitted fully the right of either House of Congress to punish for

> all contempts which infringe upon the order, dignity, or purity of their legislation and for this purpose it is not denied but that they have the power of examination, of investigation, and of calling witnesses into their presence or before their committees and of administering oaths and putting inquiries and of punishing a refusal to answer.[1]

As to the effect of the statute of 1857, he held that it did not take away the power of Congress to punish for contempt. It was common he said for a person to be punished for a contempt and misdemeanor because of one and the same act. He cited Houston's case as precedent and said he thought this statute was mainly to add to the already existing inquisitorial power of Congress. While admitting the power of Congress in this respect he added: "That it is entirely competent for any court of justice to inquire into the privilege of Congress, and that the doctrine that Congress is the sole judge of its own privileges can never be the rule in a court of justice and can never be sustained." [2]

The attorney who appeared for the Sergeant at Arms in

[1] 43d Cong., 2d sess., *Record*, p. 724.

[2] *Ibid.* Note: For complete report of court proceedings see *Record*, 43d Cong., 2d sess., pp. 707-727.

this proceeding, (Mr. Shallabarger) made a long statement as to the constitutional powers of the House in contempt proceedings and the effect of the issue of the writ of habeas corpus on them. He included in his argument the point that Congress derived the power to punish for contempts as an implied power from the Constitution. He cited many authorities including Cushing, Cooley, Kent, and the case of Anderson v. Dunn, in support of his arguments. In summarizing he said:

> We have now decided that by the authorities we have cited that the powers of the House of Representatives touching the privileges of the House are derived from the Constitution of the United States; that in the execution of these powers in assertion of the privileges of the House, the House acts and sits as a superior court; that its decision upon questions of contempt are conclusive and final, as the judgment of any other Supreme Court and that such commitments for contempt may be, at the discretion of the House, either to the custody of the Sergeant at Arms or to the common jail; that the legal design and purpose of such commitments are not merely punishment, but also remedial, and in aid of its power to enforce the production of testimony.[1]

In discussing the effect of the statute of 1857 he stated that

> inasmuch as the power of punishment for contempt by the House is a power based on the Constitution, it is wholly incompetent for the two Houses of Congress, to strip either House of any one of its constitutional prerogatives or privileges whether such prerogative or privilege be conferred on such House by express provision or by necessary implication. Upon the most obvious and self evident principle is it true that an implied power can no more be legislated away from either House than can an express power.

[1] 43d Cong., 2d sess., *Record*, p. 725.

The writ was dismissed and Irwin was remanded to the custody of the Sergeant at Arms.[1] At this juncture Irwin decided to answer the questions asked of him by the committee, whereupon he was discharged from custody.

This case is very important for it is the first one arising after the Statutes of 1857 were enacted, where a conflict of power developed between the courts and the common law power of Congress to punish for contempt. While the writ was dismissed, we note the court saying that it had power to review these proceedings and that the decision of the Houses of Congress in such cases was not final. This doctrine was directly antagonistic to the opinion in Anderson v. Dunn and foreshadows the decision in Kilbourn v. Thompson. If this ruling was correct, it meant that prisoners held under punishment by either House of Congress might gain their freedom through petitioning the courts for writ of habeas corpus, and even though the writ was dismissed, this power of the courts to review would act as a threat and check on the unconstitutional exercise of such powers of Congress. The fact that the House turned over the prisoner while protesting the proceedings shows their fear of this power of the courts. As we shall see later this power of the courts to review has acted as a very effective check on the exercise of the inherent or common law power of the Houses of Congress to punish for contempt in cases of witnesses refusing to testify and has virtually forced them to punish witnesses according to the statutes.

The testimony and papers taken by the committee on Ways and Means were submitted to the House, which in turn referred them to the Committee on the Judiciary with instructions to inquire what action should be taken by the House in reference to the members elect to the House, William S. King and John G. Schumaker, charged with complicity in

[1] 42d Cong., 2d sess., *Record*, p. 724.

the alleged corrupt use of money to procure the passage of an act providing for a subsidy in the China Mail service during the forty-second Congress and with giving false testimony thereto before the Committee on Ways and Means.

The Committee on the Judiciary, in its report to the House, recommended that the testimony of the Committee on Ways and Means be further considered by the House to the end that they make further action against King and Schumaker, and also that the Clerk of the House transmit to the United States District Attorney a copy of the evidence taken before the Ways and Means Committee.

As to the jurisdiction of the House in cases of violations of law or offenses committed against a previous Congress, the Committee said in its report:

> Your Committee are of the opinion that the House of Representatives has no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. This is purely a legislative body, and entirely unsuited for the trial of crimes. The fifth section of the 1st Article of the Constitution authorizes "Each House to determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member." This power is evidently given to enable each House to exercise its constitutional function of legislation unobstructed. It cannot vest in Congress a jurisdiction to try a member for an offense committed before his election; for such offense a member, like any other citizen, is amenable to the courts alone. The committee referred to the case of Humphrey Marshall, Senator from Kentucky, who was charged with perjury, four years after the adoption of the Constitution. The Committee to whom his case was presented, reported against the jurisdiction of the Senate.[1]

The case of Hallet Kilbourn should be considered one of the most important in this study as it directly led to the de-

[1] 44th Cong., 1st sess., *House Report no. 815.*

cision of the Supreme Court of the United States in the case of Kilbourn v. Thompson.[1] This decision placed a check rein on the Congressional power of investigation and ignored an imposing list of precedents. The favorable attitude of the court in Anderson v. Dunn was no longer visible and much of that decision was overruled.

On January 24, 1876[2] the House adopted the following preamble and resolution, after stating that the United States was a creditor of Jay Cook and Company,

> now in bankruptcy by order and decree of the District Court of the United States in and for Eastern Pennsylvania resulting from the improvident deposits made by the Secretary of the Navy of the United States, in the London branch of the said House of Jay Cook and Company . . . and whereas the courts are now powerless, by reason of said settlement, to afford adequate redress to creditors.
>
> Resolved, That a special committee of five members of this House to be selected by the Speaker, be appointed to inquire into the nature and history of said "Real Estate Pool" and the character of said settlement, with the amount of property involved, in which Jay Cooke and Company were interested, and the amount paid or to be paid in settlement with power to send for persons and papers, and report to this House.

The committee known as the Real Estate Pool and Jay Cooke Indebtedness Committee was appointed under the above resolution and on March 15 reported that it had issued a subpoena *duces tecum* and served it on Kilbourn.[3] It was a very broad subpoena, virtually demanding of Kilbourn that he produce all papers, documents, etc. which could or might afford any information or evidence relating to the said matters to be inquired into by said committee. Kilbourn

[1] See *infra*, ch. vi, pp. 350-355.

[2] 44th Cong., 1st sess., *Record*, p. 598.

[3] *Ibid.*, p. 1705.

had appeared before the committee but had refused to answer certain questions, claiming they were of a private nature. He was asked, for example, who the other members of the Real Estate Pool were, etc. He refused to answer all these "personal questions." The House adopted a resolution directing the Sergeant at Arms to take him into custody and bring him to the bar of the House, to show cause why he should not be punished for contempt. The following question was put to him by the Speaker:

> Mr. Kilbourn, you are presented at the bar of the House, upon the order of the House, under arrest for an alleged breach of the privileges of the House in refusing to answer certain questions propounded to you by the committee of the House, which questions that committee was authorized by the House to ask. It is my duty now by authority of the House, to ask you whether you are ready to answer those questions before the committee?

Kilbourn requested that he have the aid of counsel in making his reply. A debate ensued as to whether Kilbourn was entitled to the aid of counsel and the consensus of opinion seemed to be that he had no such right. The discussion on this point was interrupted by Kilbourn, requesting that he be allowed to make a written statement in reply, and withdrawing his request for counsel. This latter request was granted and Kilbourn made reply to the Speaker, still refusing to divulge the names of the persons interested with him in the Real Estate Pool, or answer other questions, saying that

> if the Committee has, or the House has, any well grounded reason to believe that the production of my private papers will promote any public business or remedy any public wrong, and if either the committee or the House will assert that to be true as a matter of fact, the House and all its committees shall have whatever is demanded, or if any private individual will make oath that the papers asked for will lead to the detection

of any misgovernment or the exposure of wickedness in high places, they shall be open as day to your inspection. On the other hand, I cannot acknowledge the naked arbitrary right of the House to investigate private business in which nobody but me and my customers have any concern.

Kilbourn further claimed that the revision of the statutes in 1873 [1] had transferred the power of trial and punishment in the case of refusal to obey a subpoena or to answer a proper question, to the criminal courts of the District. If the House is protesting against the settlement made by the trustees in bankruptcy, the bankruptcy court alone has the authority to furnish a remedy.

The Speaker, after he had made his statement, then asked him the questions formerly addressed to him by the committee. He still refused to answer, whereupon the House agreed to a resolution that he be considered in contempt, and the Sergeant at Arms was directed to put Kilbourn in the county jail under his custody. Shortly after Kilbourn was put in jail, the Speaker received a communication from H. H. Wells, U. S. Attorney for the District of Columbia, reciting that the Grand Jury had found an indictment against Kilbourn under provisions of the Act of 1857, and that a warrant had been issued to arrest and bring Kilbourn for trial before said court. The Sergeant at Arms then notified the Speaker that the warrant had been served and that he wanted to know what he should do.

Mr. Glover, then chairman of the committee conducting the investigation, recommended in a proposed resolution that Kilbourn be kept in the custody of the Sergeant at Arms until he was willing to answer the questions of the committee and that the Sergeant at Arms should not give up his custody to anyone.[2]

[1] See *infra*, ch. v, p. 326.

[2] 44th Cong., 1st sess., *Record*, p. 2008.

Thereupon a long and able debate followed as to the general powers of the House to punish for contempt, as well as its power to hold Kilbourn in spite of the warrant of the court. It should be stated that the Speaker had previously certified the facts of Kilbourn's contempt as required by the statute, and the court had taken immediate action.

The speech of Judge New of Indiana is one of the best found in congressional proceedings referring to the legislative power of investigation. He considered, in his speech, the charge of the witness, made in his statement in the House, that the questions asked of him were an interference with his private rights and a denial of his constitutional liberties, and that the investigation was made on no specific charges; as follows:

It cannot be said that there must be some foundation laid or showing made as to the materiality of the papers etc. called for. It is well settled that if any objection exists as to the form or substance of a subpoena *duces tecum,* such obligation is presented and considered after the return of the subpoena. . . . In the Credit Mobilier investigation, papers of all kinds, letters of the most private character, were examined. The books of one of the banking houses of this city, covering a period of over one year, were freely overhauled by and before the committee. The rights of the witness under the 4th Amendment of the Constitution are not invaded by the common parliamentary law and the law of Congress, nor by any action taken thereunder by the committee of the House. No unreasonable or any other kind of search or seizure of his papers is being attempted. He is asked to produce certain books and papers before the committee in answer to a subpoena *duces tecum.* . . . Can it be fairly claimed that to require the production of books and papers by subpoena *duces tecum* is a violation of his rights under the Constitution? If so, then it follows that a subpoena *duces tecum* should not issue in any case, that it is an unconstitutional

[1] 44th Cong., 1st sess., *Record,* pp. 2008-2018.

process, and that fact has never been discovered until now. . . . The power of this House as to calling for and compelling the giving of testimony, whether oral or written, is much greater than that of the courts. The additional power is justified and predicated upon the grounds of public policy.[1]

A warning as to what the decision of the Supreme Court was to be is given in the speeches of Mr. Kasson of Iowa and Mr. Hoar of Massachusetts, who were not so sure of the power of the House in the premises as was Judge New. In discussing this case Mr. Kasson said:

We have unquestioned jurisdiction over certain classes of subjects; those relating to frauds practiced by the House, those relating to corruption and attempts at corruption of its members. We have had frequent investigations upon those subjects, and there is no debate about our right to demand and exact from witnesses testimony relating to such matters. On the question of impeachments, the House has unquestioned jurisdiction, because it is conferred by the Constitution, and we have the right to require testimony upon the grounds of impeachment within the range of our powers to impeach. We have the power of legislation, as in the preparation of a tariff bill; and we may summon before us witnesses from all parts of the country to give information relating to these subjects of investigation. . . . But under what class of subjects pertaining to the clear jurisdiction of the House does this inquiry come upon which the case before us is presented? Shall the House of Representatives take from the court its jurisdiction in a case of bankruptcy, because of an alleged interest of the United States? The court has, it is said, affirmed the settlement made by the assignee with this company or copartnership known as the "Real Estate Pool." The court has the right to set aside that settlement for fraud, to set it aside for mistake, to reopen it on any ground that is within the privilege of the citizen or of the Government. The court has that power. It is pertinent to the jurisdiction of the

[1] 44th Cong., 1st sess., *Record*, p. 2009.

House to proceed as a prosecuting attorney to find facts in a case where the United States has its agent, its prosecuting attorney and its court, all of whom have proceeded and acted without any charge or irregularity. . . . This case has gone to the extremest verge to which I have known the power of the House extended in making inquiries as to matters before the courts; and if you had not by former legislation given power to the assignee and the court to fully protect the interests of the United States I should be obliged to admit and assert that it was your duty to see what further legislation is demanded by making this investigation, and then enacting such legislation.

But such he held was not the need in this case, as ample provision had been made by legislation to take care of such proceedings.

But with the power as complete as it is, with no allegation of fraudulent settlement, with no allegation of misconduct on the part of the court, I submit it to the judgment of the House, that you are on this point using discretionary power probably vested in you with more danger to the rights and personal liberties of the citizen than probability of good to the United States.[1]

Also Mr. Hoar said, although he usually favored such investigations:

I think myself that, before ordering this investigation originally, this House ought to have required a charge from some responsible source, not of a crime against anyone, but of the probability that the investigation would reveal matters fit for the criminal jurisdiction, and the legislative remedies of the House. I think the House should have been more careful in limiting that question, which, although it has a perfect right to put it, still seems to trench somewhat on the constitutional provision which protects the private papers of a citizen. More careful consideration should have been given to the grave question of constitutional liberty, which lies at the foundation of this particular inquiry.[2]

[1] 44th Cong., 1st sess., *Record*, p. 2013.

[2] *Ibid.*, p. 2017.

The right of the House to retain Kilbourn in custody, until he answered the questions of the committee, in spite of the warrant for his arrest and appearance before the District Court, was upheld in the debate without serious objection being raised. Eventually Mr. Glover's resolution was adopted and the Sergeant at Arms was directed not to give up custody of the prisoner until so ordered by the House.

A humorous turn was given the case of Kilbourn in the House when Mr. Glover on April 3, 1876 moved that the rules of the House be suspended so as to allow him to submit and the House to agree to the preamble and resolution which stated that the prisoner had been enjoying the most sumptuous food, "his meals are being sent to him twice daily from the capitol to the jail in a hack . . . and he is being furnished by his friends with the most sumptuous wines," therefore the resolution directed the Sergeant at Arms to contract with the jailor of the District "to furnish to Kilbourn the same prison fare as is furnished to other prisoners in the jail." The House refused to suspend the rules and agree to the preamble and resolution.

On April 12, the Speaker received another letter from the Sergeant at Arms this time notifying him that a writ of habeas corpus had been served on him, demanding that he bring the body of said Kilbourn before one of the justices of the Supreme Court of the District of Columbia. He asked the Speaker for instructions. The matter was referred to the Committee on the Judiciary with orders to report their opinion in three days.

The committee reported in the form of a preamble and a resolution,[1] the resolution directing that the Sergeant at Arms be directed to make a careful return of the writ, setting out the causes of the detention of said Kilbourn, and to retain the custody of his body and not to produce it before the said

[1] 44th Cong., 1st sess., *Record*, p. 2483.

judge or court without further order of this House. In offering the resolution of the committee Mr. Hurd said that first,

> the House possesses undisputed authority to authorize the examination of witnesses, and to punish them if they refuse to answer questions lawfully propounded, or are otherwise guilty of contempt of the authority of the House. At nearly every session of Congress it has been necessary that witnesses should be examined on some question or other; and in many sessions questions that have been propounded have been refused to be answered, so the authority to punish has been frequently exercised and under the authority of the Supreme Court (Anderson v. Dunn) has become so perfectly a part of the parliamentary law of these bodies that I do not think that anybody will dispute it.

He claimed that the inquiries addressed to Kilbourn were pertinent as members of Congress might be involved in this real-estate pool. But the most important statement he made was the following:

> But whether these interrogatories were pertinent or not, the fact is that this House has solemnly adjudged that the witness is in contempt of the authority of the House, and when in the exercise of its unquestioned jurisdiction it has so declared, there is no power in the land which has the right to review its decision.

Mr. Hurd insisted that the subject matter of the investigation was entirely within the jurisdiction of the House, and that its adjudication was final and conclusive over every other authority.

The most important question in the debate became whether the House would deny to a citizen of the United States imprisoned by its order, the right to a hearing before the courts on a writ of habeas corpus. In support of the argument that the adjudication of the House was final and conclusive, and that no other authority could review its proceedings in

this respect, reference was made to many authorities on the subject as well as to previous cases.

For example, Hurd on Habeas Corpus was cited as follows:

It is a rule essential to the efficient administration of justice that where a court is vested with jurisdiction over the subject matter upon which it assumes to act, and regularly obtains jurisdiction of the person, it becomes its right and duty to determine every question which may arise in the case without interference from any tribunal. The right of punishments for contempt by summary conviction is inherent in all courts of justice and essential to their protection and existence. A commitment under such conviction is not subject to review in any other court, unless especially authorized by statute. It cannot be attacked under a writ of habeas corpus except for such defects as render the proceedings void.

Blackstone was quoted as follows:

All courts, by which I mean to include the two houses of Parliament and the courts of Westminster Hall, can have no control in matters of contempt. The sole adjudication of contempt and the punishment thereof, belong exclusively and without interference to each respective court. Infinite confusion and disorder would follow if courts could, by writs of habeas corpus, examine and determine the contempt of others.

The Passmore Williams case was also cited as an authority in support of this proposition.[1]

Moreover it was said in aid of this position that when upon a return of a writ of habeas corpus all the facts are disclosed, so that it may be brought to the knowledge of the court that it had no authority to issue the writ in the first place, or to discharge the prisoner, or to bail him, a return setting forth these facts is sufficient without the production of the body.

[1] Passmore Williams Case, 26 Penn. State 9.

Probably the strongest argument for the committee's position was that made by Mr. Lawrence. In a very elaborate discussion he pointed out that the question before the House was whether the sentence pronounced and the decision already made by the House could be re-examined and annulled by the judge of a civil court. "If this be so it must be confessed that every investigation ordered by the House is at the mercy of a single judge. If the House shall now surrender to any alien jurisdiction organized for other purposes its power to investigate and expose and legislate against corruption and fraud, and thus imperil every interest of the people, they may well stand the inquiry whether we have not grievously erred to their prejudice." [1] In support of the resolution of the committee, he offered four propositions:

1. The House has power to institute investigations by committee and to summon and examine witnesses. . . . [This he proved by reference to parliamentary law and custom, by precedent, by reference to Blackstone's Commentaries vol. i, p. 163 . . . and claimed this was a legislative power derived as an incident of the legislative authority, growing out of the rule alike of common and parliamentary law, that where a power is given this *ex necessitate* carries with it all the other incidental powers necessary and proper to make it effectual.]

2. As an incident of this power, the House has authority to judge of contempts on the part of witnesses in refusing to testify, and to punish the same by imprisonment or censure. [Here he referred to the constitutional clause, "All legislative powers herein granted etc." and claimed we imported the municipal common law and *lex consuetudo Parliamentari* from England. The existence of a right, he said, was established by its repeated exercise.]

3. The judgment of the House is final and conclusive—

[1] 44th Cong., 1st sess., *Record*, p. 2491.

1st, as to its jurisdiction and 2d, as to the right mode and expediency of exercising it by sentence of imprisonment. It follows from and as a consequence of this that no judicial court can inquire upon habeas corpus into the jurisdiction of the House to imprison during the existence of Congress. It is a sufficient answer to a writ of habeas corpus that the prisoner is held by the Sergeant at Arms and he is not required to produce the body.

In other words he claimed that a judicial court had no power on habeas corpus to revise sentence of commitment, made by the House, either for want of jurisdiction, or in an erroneous exercise of authority. This argument was supported by the contention that it must be so for reasons of public policy. "Congress legislates for forty millions of people. A witness is summoned before a committee and while giving his testimony he applies for a writ of habeas corpus. Can a court inquire whether the subject of his testimony is one as to which the House has a right to inquire? Can legislation be arrested to await the pleasure of some judge in deciding on a habeas corpus? The power to examine witnesses is so transcendently important that it goes far beyond the power of courts. In the courts a witness cannot be compelled to give evidence that may criminate himself and he is made the judge to decide if it will. But before a committee of Congress even counsel can be compelled to disclose confidential communication of clients. Here the maxim applies; *salus populi suprema lex.* No great hardship can result because the witness will always have it in his power to relieve himself by testifying." He quoted Judge Story on this point who said:

The argument of inconvenience has been pressed on us with great earnestness. But where the law is clear, this argument can be of no avail and it will probably be found that there are also serious inconveniences on the other side. Wherever power

is lodged, it may be abused. But this forms no valid objection against its exercise. Confidence must be reposed somewhere.

Mr. Lawrence believed that from the very nature and structure of our government the judicial courts cannot interfere. They administer judicial law; this is parliamentary law. A judicial court cannot review or reverse a legislative sentence, because a court cannot exercise legislative power, due to the necessity of preserving intact the powers and independence of the coordinate branches of our general system. In fact, the independence of the House is so perfect, its jurisdiction so far beyond the courts, that a judicial court cannot summon a member as a witness.

Mr. Lawrence further maintained that the witness Kilbourn was not protected from the duty to produce books and papers required of him by any provision of the Amendments to the Constitution.

When the question arises in court what is an "unreasonable search" the courts must decide it. When it arises as to a witness before this House or a committee, this House is the sole judge whether the proposed search is reasonable or not. . . . But the provisions relating to searches in the Amendment of the Constitution have no reference to the production of books and papers by witnesses before Congress. This provision is a restraint upon the powers of the courts. It has no application to Congress in exercising the power to examine witnesses or to require the production of papers, though of course its spirit and purpose should be generally regarded as a rule of parliamentary law applicable to the House. But the law is to be administered by the House and not under the direction of the judicial courts.

4. The final argument of Mr. Lawrence was that the statute of habeas corpus did not require the production of the body of the Sergeant at Arms, as this act could not deny any privilege granted to Congress by the Constitution. More-

over the act did not in express terms apply to imprisonment by order of the House.[1]

A formidable opposition developed to the arguments stated above. Mr. Lynde, in opposing the resolution of the committee, maintained that the precedents in Parliament where the House of Commons had refused to bring the body into court on a return of a writ of habeas corpus were very few, in fact the last one occurred in 1704.[2]

On the other hand for more than a hundred years, where the party has been under arrest by order of the House of Commons or the House of Lords for contempt, writs have been frequently issued from the courts, and the prisoners have been brought before the courts on those writs and in not a single instance has Parliament refused to allow the body to be brought before the courts on a writ of habeas corpus. There has been no instance in this country where a party has been arrested by order of any legislative body and the writ of habeas corpus has issued, where the legislature has refused to present the body in court.

He referred to the case of Irwin where the House, while trying to maintain the position recommended by the Committee in Kilbourn's case, yet adopted a resolution handing over the body of Irwin to the court. He cited the decision of Justice Denman in Stockdale v. Hansard [3] as supporting the view that the court even had a right to inquire into the privileges of the Houses of Parliament or determine whether the Parliament had jurisdiction over the subject matter.

Whether this House is the sole judge of its privileges, whether this House can arbitrarily investigate and examine witnesses, commit for contempt, or imprison for any violation of the

[1] See *Revised Stat.*, sec. 751-766.

[2] 44th Cong., 1st sess., *Record*, p. 2487.

[3] Stockdale *v.* Hansard, 9 Adolphus & Ellis 1.

orders of the House, without a possibility of the authority of this House being examined into, is a moot question.

Again he said:

There is an undoubted limitation upon the power of this House as to the character of the subject matter of the investigation submitted to it, and the jurisdiction of this House over the subject matter and thereby over the man they hold, is a subject which under the law of the land can be properly inquired into by any court.[1]

Others of the opposition believed that the courts were the proper tribunals to pass upon these questions of personal liberty. The House does not deliberate upon questions of legal right with that coolness, with that sense of responsibility, with that learning and investigation that the courts possess upon these questions.

At any rate, the opposition said that the American people believed the writ too valuable to be trifled with and it would do no harm to make a full return of the writ to the court in a case where so much doubt existed.

The House finally adopted the resolution of the Committee on the Judiciary as amended by Mr. Lynde as follows: Resolved,

That the Sergeant at Arms be, and hereby is, directed to make a careful return of the writ of habeas corpus, in the case of Hallet Kilbourn, that the prisoner is duly held by authority of the House of Representatives to answer in proceedings against him for contempt, and that the Sergeant at Arms take with him the body of said Kilbourn before said court when making such return as required by law.

The vote was 165 to 75.

[1] 44th Cong., 1st sess., *Record*, p. 2520.

Kilbourn appeared before the Hon. D. K. Cartter, Chief Justice of the Supreme Court of the District of Columbia who handed down a decision on April 28, 1876, the substance of which held that by the acts of 1857 and 1862 and their revision in 1874, Congress had decided the way it would punish for contempt and had defined as well what constituted a contempt.

> The power of punishment under the statute is not in extinguishment of the constitutional right of punishment for contempt, but in definition and expression of it. With the judgment of the House in contempt, its power to punish terminated and the punishment prescribed by law supervened. In pursuance of the authority and command of the law, the Speaker certified the offense to the District Attorney, and the grand jury found an indictment against the relator which brings his body within the jurisdiction of the court charged with trying the offense stated, to which tribunal I feel it my duty to deliver him for trial.[1]

This decision of Justice Cartter upheld the attitude of Justice MacArthur as stated in Irwin's case, regarding the right of the courts to inquire into the privileges of Congress, but did not support the contention of the latter decision that Congress had the parliamentary or common law power to punish for contempt, in addition to the punishment according to the statutes.

Kilbourn's case was eventually carried to the Supreme Court where a most important decision was handed down by Justice Miller, upholding the power of the courts to review the power of the Houses of Congress to punish contumacious witnesses for refusing to testify. However this decision did not discuss the common law power of Congress to punish in these cases regardless of the Statute of 1857 and subsequent amendments. This question was not settled until *In re*

[1] 53d Cong., 2d sess., *Senate Misc. Doc.*, vol. xii, p. 552.

Chapman in 1894.[1] It is fully discussed in another place in this study.[2]

Since Congress understood the decision of the Supreme Court in Anderson v. Dunn [3] as sanctioning a wide range of inquiry, and as it had not been checked in its development of the power of investigation and its concomitant, the power to punish for contempts, until the decision in Kilbourn v. Thompson,[4] it was only natural that both Houses of Congress should have built up a formidable array of cases and precedents supporting this power by 1876, the year of the Cartter decision.

In the course of the investigations and contempt proceedings studied in this chapter we find both Houses denying the application to them of the first ten amendments to the Constitution, on the ground that these proceedings were not "judicial" or "cases" but legislative proceedings, whereas these amendments were expected to apply only to cases in the courts. Hence the personal rights of citizens were not protected by the Constitution from the excess of legislative or "political" zeal exhibited in many of these proceedings.

That the legislative power of investigation ranged far and wide in the search for information cannot be denied; the personal right of freedom from unwarranted searches and seizures was often flagrantly abused.[5] Searches were often made into the private papers of third parties which could have only the remotest relation to the subject of the investigation.[6] Both Houses of Congress punished for contempt

[1] *In re* Chapman, 166 U. S. 668 (1897).

[2] See *infra*, ch. vi, pp. 358-361.

[3] Anderson *v.* Dunn, 6 Wheaton 204.

[4] Kilbourn *v.* Thompson, 103 U. S. 168.

[5] Case of investigation of the U. S. Bank, 1832, pp. 103-107; also see *supra*, pp. 115-122, 123, 124, 158, 169, 176, 178, 212, 213, 214.

[6] *Ibid.*

regardless of the Statutes of 1857 and 1873.[1] General warrants were issued by both Houses, arresting persons charged with contempt, without any oath to substantiate the facts.[2]

The proceedings and debates studied furnish ample proof that Congress carried the exercise of its power to investigate and punish for contempts in some cases to extreme limits. In fact, in one case, a witness was actually threatened with violence unless he testified.[3] In another case, the House sentenced a violator of its privileges to jail for a longer term than its session.[4]

It is true that a semblance of judicial form was maintained in contempt proceedings before both Houses; for witnesses were sworn, the prisoner was allowed to plead in his own defense, and was usually given the right of counsel, but much of the testimony was *ex parte,* often innuendo and without basis in fact. Moreover, whenever the House concerned became especially incensed at the actions of a prisoner it could deny him the privilege of counsel.

One must be impressed with the futility of many of these proceedings, which often lasted longer than a month, embodying a discussion of trivial matters which could have been settled by a common court in half a day. In fact, at times, those supporting the exercise of this power by Congress, admitted the great waste of legislative time and the general futility of these proceedings.[5]

Much of the criticism of these "trials" for contempt before the Houses of Congress could have been evaded by simply certifying the facts of a witness's contumacy to the

[1] See *supra*, Hyatt's Case, ch. iii, pp. 161-167; Wolcott's Case, ch. iii, pp. 154-160; Wooley's Case, ch. iii, pp. 174-180; Case of Irwin, ch. iii, pp. 202-209.

[2] Note *supra*, pp. 38, 67, 68, 69, 78, 188, 189.

[3] Whitney's Case, *supra*, ch. iii, pp. 123-134.

[4] Case of Patrick Woods, *supra*, ch. iii, p. 180-184.

[5] See Whitney's Case, *supra*, ch. iii, pp. 123-134.

district attorney, as provided for in the statutes; moreover the conflict of power which developed between the courts and Congress, such as is the case of Irwin and Kilbourn, could have been largely avoided. However the truth of the matter is that Congress looked upon the statutes as having been enacted for the sole purpose of punishing a recalcitrant witness after they had punished him to the limit of their common law power which was, of course, by imprisonment to the end of the session of the particular House concerned.

As to whether the Houses of Congress should have power to punish for contempt either by virtue of their common law right or according to the statutes, the affirmative plea was made that there was need for the exercise of such power; the public necessity for information was considered more important than the inconvenience of the individual, and no doubt, this was a valid argument when applied to a "legitimate" investigation, that is, where the investigating committee adhered strictly to the subject matter of the investigation, asking relevant questions and considering fair, unbiased testimony.

That such was not always the case is seen in the reading of the debates studied in this chapter. The investigating committees of Congress often knew little about the subject matter to be investigated, and struck out blindly, hoping that by asking all sorts of questions and considering all kinds of evidence, something might be found material to the subject investigated. Yet in spite of the blunderbus character of many of these investigations, no one can deny that many of them muddled through to effective results. Investigations of minor administrative officials have nearly always been successful and have uncovered considerable graft and inefficiency in government.[1]

While it is not the purpose of this study to evaluate the

[1] For further discussion of this point see *supra*, chs. ii, iii, *passim*.

political influence in these investigations, the debates show ample evidence of partisanship. The political influence certainly often determined the effectiveness of these investigations, in fact, may have been the predominant factor both in setting many of them up and in producing effective results.[1]

Our analysis of the leading cases of contempt occurring between 1827 and 1876 shows a constant tendency to widen this power of investigation. The three-headed development of this power noted in the previous chapter continued on unchecked until the decision in Kilbourn v. Thompson. While there was always a strong opposition to the exercise of the power of investigation by Congress, we note that where the power of compulsory investigation was used in connection with the enumerated privileges of Congress,[2] which were often termed "judicial" investigations, much less complaint was made, than where the investigation was what might be termed a "legislative" one, that is, investigations as to the administration of the law, or investigations for the purpose of securing information to aid in the making of legislation.

Of the latter two, the power of punishment for contempt in investigations for the purpose of securing information was used less frequently than in cases of inquiry concerning the administration of the law. In fact, the question of the exercise of this power did not develop in the Senate until 1860 in Hyatt's case.[3] Many members of Congress who supported the exercise of the power of punishment for contempt in cases of inquiry by either House into the administration of the law, opposed it concerning inquiries for information to aid in the making of legislation.

[1] For example, note investigation of President Jackson, discussed *supra*, ch. iii, pp. 134-142.

[2] See *supra*, ch. ii, pp. 93, 94, 96, 163, 164.

[3] See *supra*, ch. iii, pp. 161-167.

The formidable mass of precedent established by 1876 favoring the exercise of inquisitorial power shows, however, that this power was used indiscriminately; that the limits of inquiry were simply considered as being the limits of legislative power.

The fact that not more protests were made to the exercise of this power, and that it was not until 1876 that a recalcitrant witness had the courage and money to carry an appeal to the United States Supreme Court, does not mean that the public always acquiesced in the proceedings. Witnesses were simply daunted by the power claimed by Congress in this respect and hesitated to oppose them.

The wide development of the power to punish for contempts in cases of investigation by Congress, made it inevitable that a decision would have to be made eventually, by the courts, on the question of the extent of this power and its bearing on the personal rights of citizens. The decision in Kilbourn v. Thompson was rather unsatisfactory though in that it did not come out into the open and state fully the limits of the Congressional power to punish for contempt. While this case is fully analyzed elsewhere, it might be noted here that the court refused in this decision to say whether Congress had the power to punish for contempt in the case of recalcitrant witnesses in "legislative" investigations for the purpose of acquiring information to aid in the enactment of legislation, although it denied that Congress had the "general" power of punishing for contempt, and implied that there were limits to this power.

CHAPTER IV

Congressional Practice Since 1876

Shortly after the proceedings in the case of Kilbourn, the question arose in the House as to the extent of its power to compel the production of books, papers and telegrams through a subpoena *duces tecum*. On December 16, 1876, the Speaker laid before the House a telegraphic message from William R. Morrison of Illinois, chairman of the select committee investigating affairs in Louisiana, informing the House that the efforts of the committee to obtain testimony had been resisted, and that the process of the House would be required. Accompanying the message was a communication from William Orton, president of the Western Union Telegraph Co., stating that the company had decided to instruct its employees not to produce before committees of either House, messages received or sent by representatives of either of the two parties, or at least not to produce such telegrams until after Congress should approve the subpoenas of the committee.[1]

The communication from Mr. Morrison was referred to the Committee on the Judiciary with instructions to report what action the House should take.

On December 20,[2] the Committee through Mr. William P. Lynde of Wisconsin, reported

that the communication fails to inform the House of the names of the persons who refuse to produce papers and telegrams, or

[1] 44th Cong., 2d sess., *Record*, p. 244.

[2] *Ibid.*, p. 325.

the circumstances under which the refusal was made. The House has the power to compel the production of books, papers and telegrams mentioned in the investigation before the committee, and any witness who shall refuse to produce such books or telegrams, when required, shall be brought before the bar of the House to answer for a violation of the privilege of the House.

The Committee further reported a resolution providing for the summoning of witnesses, who refuse to obey subpœnas or those who intimidate witnesses, before the bar of the House to answer for a breach of privileges.[1]

This report caused an interesting debate as to the proper practice and rights and powers of the House in the case of compelling the production of papers. An amendment was immediately offered to the resolution of the Committee, which demanded that subpoenas issued by House committees commanding telegrams, books, papers and other documents, should describe them with such convenient particularity as may be, in order that they may be capable of identification, also if they could not be so named, due to the ignorance of the committees of names of parties to such telegrams, " then any description, which will enable telegrams to be identified, shall be deemed sufficient."

In the ensuing debate the point was made that this amendment was offered to " prevent a practice which has arisen in some places of issuing subpoenas which may be regarded as *drag net* subpoenas which may call on telegraph operators to bring before a committee the private telegrams of many other individuals, which may be irrelevant to the subject matter of the inquiry." On the other hand it was stated that a House committee of investigation is appointed because the House does not know the facts they seek to reach, and they should have authority to investigate so far as the public interest requires, and to use every legal means for the purpose of promoting the public interest in that respect.

[1] See *Record*, 44th Cong., 2d sess., p. 325.

It was suggested that a distinction should be made between an investigation conducted by a committee of this House, and an investigation conducted before a legal tribunal. In the latter case, in a contest between parties litigant, the private papers of either party are not subject to production unless the party calling for them makes out such a preliminary state of facts, as in the opinion of the judge, authorizes their production, because of their pertinency and relevancy to the subject matter in litigation between the parties. Those opposing the amendment said that was not the rule in an investigation before the committee of a parliamentary body for

such a committee has a broader, less restricted power, that it is indeed with respect to public matters, inquisitorial in its nature. To maintain that such a committee, engaged in an important public investigation, should be limited by the rule which applies in a court of law or equity, between parties litigant with reference to private rights, would so hamper the power of investigation which this House possesses with reference to matters of public concernment as to render it almost nugatory.

Reference was made in the debate to the rule as set forth by Cushing.[1]

The order for the attendance of witnesses, or for the issuing of a Speaker's warrant to summon them, may also require the production of books, papers and records. In the former case the order ought to be specific, and to describe the books, papers and records, to be produced with as much certainty as the nature of the case will admit of; in the latter the order may be in such general terms (as for example, for such books and writings as shall be desired) as the order for issuing the warrant, but the warrant itself should be specific and certain as above mentioned. It does not appear to be necessary, however, that the name of the particular witness who is required to produce a paper or other document should be mentioned in the order or the war-

[1] Cushing, *op. cit.*, sec. 936.

rant, provided, he be otherwise designated or may be ascertained with sufficient certainty. Thus the order may direct that the person or officer attend with the books, papers and records desired; as for example, a proper person from a banking house named with their bank books for a certain month; or the proper officer with a specified paper from one of the public offices; or a particular paper may be ordered to be laid before the House, without specifying by whom it is to be done.

Other speakers who supported the exercise of the power questioned in this case, added that it had been the rule of the House of Representatives to examine the private banking accounts of various persons; and notably those of Andrew Johnson during or before his impeachment trial.[1]

It was argued in the debate that the object of this inquiry instituted in New Orleans by the committee was the production of official papers of the returning board in one instance, and of the telegrams forwarded by certain officials of the government to the officials in New Orleans, in reference to the count of votes polled in that state. "We desire the three committees now in the Southern States to get at the bottom facts in relation to the recent elections in those states. This House, the Senate, and the country have a right to know all the facts necessary to a full knowledge of the subjects now being investigated by our committees in South Carolina, Florida and Louisiana. The committees of this House are authorized to summon and compel the attendance of all persons, within the limits of the United States as witnesses, and to bring with them papers, records in the same manner as is practiced in courts of law."[2] The House of Representatives possesses all the powers of jurisdiction, in a judicial way, which are recognized by the common parliamentary law. It has power to institute inquiries into all the grievances of the citizen which are remediable by legislative enactment, and into all abuses of power by persons

[1] 44th Cong., 2d sess., *Record*, p. 329.

[2] See Cushing, *op. cit.*, sec. 634.

in office with a view to their removal or impeachment; it has the same power to investigate all such subjects, by the examination of witnesses or otherwise as that practiced by grand juries.[1]

Would not a grand jury or a court of justice have the right to compel the production of telegraphic dispatches in the progress of its investigations?

The opposition in this case protested this view, claiming that before the custodian of a private telegraphic dispatch should be required to produce it before this House, two things should be required: first, that the committee should determine in some way that there is reasonable cause to believe that there are dispatches in the possession of some person that will be material to the matter under investigation; second, these dispatches should be so described by the committee that they may be identified; "the practice of calling for telegraphic dispatches in the gross, of calling for all the dispatches in a particular office, or calling for all the dispatches sent out by a particular individual, without any reference to the subject matter in them, is an unreasonable and improper practice."

Finally a resolution offered by Mr. Knott of Kentucky, amending the resolutions of the Committee on the Judiciary was adopted by the House as follows:

That there is nothing in the law rendering a communication transmitted by telegraph any more privileged than a communication made orally or in any other manner whatever; that this House has the power through its subpoenas, under the hand and seal of the Speaker, to require any person to appear before any committee to which it has given authority to examine witnesses and send for persons and papers, and bring with him such books and papers whether the paper be telegraphic messages or others which the committee may deem necessary to the investigation with which it may be charged. [The resolution further provided]

[1] Cushing, *op. cit.*, sec. 641.

that any witness refusing to obey such a subpoena should be brought to the bar of the House upon a report of the facts by the committee to answer for a contempt of the authority of the House and to be dealt with as the law under the facts may require.[1]

On December 21, 1876,[2] the Speaker laid before the House a telegram from the chairman of the committee communicating the proceedings in the case of E. W. Barnes, manager of the Western Union Telegraph Company in New Orleans, a recusant witness. Under the authority given the committee by the House to send for persons and papers, the committee had caused the following subpoena *duces tecum* to be issued:

By Authority of the House of Representatives
of the United States of America.

To John Thompson, Esq.
Sergeant at Arms, or his Special Messenger;

You are hereby commanded to summon E. W. Barnes of the Western Union Telegraph Company at New Orleans to be and appear before the Louisiana Affairs Special Committee of the House of Representatives of the United States, of which William R. Morrison is chairman, and with all telegrams sent or received by Wm. Pitt Kellogg and [here are given the names of seven others] at the office of the Western Union Telegraph Company, New Orleans, from and after the 15th day of August, 1876, in their chambers in the city of New Orleans at the St. Charles Hotel, and forthwith then and there to testify concerning matters of inquiry committed to said committee. Herein fail not and make return of this summons. Witness my hand and seal of the House of Representatives of the United States, at the city of Washington, this 13th day of December, 1876.

Samuel Randall, Speaker.

Attest; George M. Adams, Clerk.

[1] 44th Cong., 2d sess., *Record*, p. 330.

[2] *Ibid.*, p. 352.

On this subpoena was indorsed, "served personally with a copy at one and half o'clock, P. M. December 13, 1876."

John G. Thompson, Sergeant at Arms,
by J. W. Polk, Special Messenger.

On appearing before the committee the witness refused to produce the telegrams, acting under instructions of the officers of the company. The committee thereupon voted to communicate the refusal of the witness to the House. A resolution was offered in the House directing the issue of a warrant by the Speaker summoning Barnes before the bar of the House to answer for his contempt.

Some debate followed the introduction of this resolution, in which opposition was taken to the subpoena *duces tecum* issued by the committee in summoning Barnes to appear. Mr. George McCrary of Iowa criticised it as too broad and general in its terms, authorizing too wide an inquiry into the private affairs of the citizen. He said:

It is a scandal to the American name that such a demand should be made and be enforced by this House under the pains and penalties of imprisonment. Now if this be a proper proceeding, if this be allowable under the laws of the land, if this be within the proper jurisdiction of the House, then there is no security for the citizen in his private papers. The provision of the Constitution which declares that "the right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures shall not be violated" may be rendered nugatory and void by an investigating committee of this body. . . . There is no need of going to this extent . . . if your committee have good reason to believe that there are telegrams of importance that are material, let them name the persons who sent them and the persons who received them and the subject matter of them, or otherwise describe them so that they may be identified. Lay your foundation properly by making an inquiry as to their existence and materiality, but I beg of the House not

to assert the right to issue a drag net subpoena to bring before a committee of this House all the twenty five millions of dispatches sent in this country, to be handed over to that committee in order that they may see if perchance something may not be found among the private correspondence of the American people pertinent to the inquiry they are making.[1]

The answer was made that the House had already refused to lay down a procrustean rule as to the terms to be employed in framing a subpœna *duces tecum*.[2] It was suggested that, if the subpœna were limited to the terms described above, it should command the witness to produce only such communications as bear upon the subject matter under investigation. "The witness might appear and say, 'Oh, I have the dispatches,' just as this witness says, 'but whether they relate to the subject under dispute I do not know, I have not read them.' And he will never read them and you cannot make him do it. Or he may say, 'I have got the dispatches and have read them, but in my judgment they do not relate to the subject.' There you make the witness the judge of the relevancy of the testimony that the committee is commanded by the order of this House to procure for the enlightenment of its judgment. Do the lawyers upon the other side contend that the investigation should be thus trammeled, and that the object of any investigation, however important, may be defeated by evasions and subterfuges such as these? This very case is ample justification of the wisdom of the House in refusing to define the precise terms in which a subpoena *duces tecum* should be couched."[3] The resolution was adopted.

Barnes appeared before the House on January 3, 1877,

[1] 44th Cong., 2d sess., *Record*, p. 352.

[2] See *supra*, pp. 125, 126, 177, 178, 211, 214, 222.

[3] 44th Cong., 2d sess., *Record*, p. 358.

and his counsel requested delay for him until they could confer with him. The House agreed to the petition. He again appeared before the House accompanied by his counsel two days later. He was asked what excuse he had to offer for his contempt and he replied that he would like to make answer in writing under oath, as the precedent set in Kilbourn's case forbade his being heard by counsel. He was given leave to answer in such form, the Speaker observing that his statement should be under oath. During the proceedings, the report of the select committee and the answer of the witness to the House were referred to the Committee on the Judiciary to examine and report what action should be taken by the House.[1]

The Committee reported on January 12, 1877, recommending three resolutions which required that Barnes produce the telegrams mentioned in the subpoena, that he be brought before the House and asked whether he was willing to go before the committee and produce such telegrams, and if he answered that he was, that he be discharged from custody.

The Committee took the position that telegraphic messages were not privileged, that a telegraphic message was not different from an oral or written message. Henisler v. Freedman,[2] and State v. Litchfield,[3] were referred to in support of this position. As to the argument of the witness that the subpoena was a general warrant and within the prohibition of the Fourth Amendment to the Constitution, the Committee said "without describing the history of abuses of executive power as seen in general warrants, and which led to the adoption of the Fourth Amendment to the Federal Constitution, that in the hundreds of cases where subpoena

[1] 44th Cong., 2d sess., *Record*, p. 358.

[2] 2 *Parsons Select Cases*, p. 274.

[3] Maine *v.* Litchfield, 58 Maine 267.

duces tecum has been resorted to in British Parliament, English courts, Congress and Legislatures of the States, the similarity which the witness supposes to exist between that writ and general warrants condemned by the Constitutional provision cited by him has never been detected." In other words, the Committee took the position that the provisions of the 4th Amendment to the Constitution condemning general warrants had no application here as the subpoena issued in this case was not the kind of a warrant this amendment was intended to inhibit.

As to the objection that the papers named were not mentioned with sufficient particularity, the report read that the law and practice were quite settled on that point as follows:

The papers are required to be stated or specified with only that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the papers on the trial, so that they can be used if the court shall then determine that they are competent and relevant evidence. Though the writ may in effect demand a search for the messages, it is the duty of the witness to make reasonable search for the papers and documents if in his possession.

The contention that the law of Louisiana in relation to telegraphic messages making them confidential, prevented the witness from disclosing the message, was treated as follows in the report.

It has never been questioned that the House of Representatives has the power inherent under the Constitution, from the very nature of its organization, to institute any investigation which in its judgment may be necessary to the proper discharge of its functions, that in such investigations it has the power to examine witnesses and require the production of any paper that may be necessary to render the same effectual, and that its jurisdiction

in that regard is coextensive with the limits of the United States, including Louisiana. It is, furthermore certain, that it may, in the exercise of these powers, act through a committee regularly appointed and authorized for that purpose. Those principles are so universally understood and admitted that it requires neither argument nor authority for their illustration. It follows therefore, that the law of any state which might directly or by implication, undertake to abridge the exercise of any of these powers of the House would be in derogation of its constitutional provisions and to that extent absolutely void.[1]

The witness finally agreed to produce the messages as demanded by the subpoena and he was allowed to go to New Orleans where he produced the messages, and was discharged from the custody of the Sergeant at Arms.[2]

The select committee had further trouble with recusant witnesses before its work was completed. William Orton, the President of the Western Union Telegraph Company, failed to respond to subpoena *duces tecum* of the committee, which refusal was certified to the House.[3] Mr. Orton sent a message to the House in which he alleged sickness as the reason for not attending the committee and claiming that the messages wanted were not in his possession. Events later proved that his statements were correct and the House discharged him from the custody in which he had been placed as a result of his refusal to reply to the committee.

Before the committee finished its investigation in Louisiana, however, it was to have trouble with the State Canvassing Board. On January 9, 1877, the House was informed by the chairman of its select committee in Louisiana that the members of the State Canvassing Board had refused to obey their subpoena, claiming that the papers wanted,

[1] 44th Cong., 2d sess., *Record*, p. 604.

[2] *Ibid.*, p. 1154.

[3] *Ibid.*, pp. 514, 515.

were, "a part of the records of the returning officers of elections for the State of Louisiana and are in possession of the returning officers in their official capacity," and submitted that

> the board of returning officers of election for the State of Louisiana is a body created by the laws of the State, with specific and well defined duties, partly ministerial and partly quasi-judicial, that their action under the law of their creation is final to the extent provided by law and is not subject to review by any State or National tribunal.

This case was also turned over to the House Committee on the Judiciary and on January 16, 1877 it made a report recommending that a resolution be adopted by the House directing the Speaker to issue his warrant to bring the members of the Board before the House to answer for a contempt of its authority and breach of its privileges.

In its report the Committee cited the Constitution of the United States, Art. II, sec. 1, "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress" and claimed that Congress had the right to inquire whether the persons claiming to be electors had been properly chosen, and that the power to legislate on this subject rested in Congress alone. Charges of fraud had been made against this returning board and the witnesses were subpoenaed to appear to testify in regard to the charges.[1]

The Committee further claimed that these papers were public in their nature and that every American citizen was interested in them.

> Your committee do not recognize the rights of any citizen or

[1] 44th Cong., 2d sess., *Record*, p. 668.

officer, whether Federal or State, to defeat an investigation of either House, which may involve the existence of the Government, by refusing to appear and testify. If a state officer can be compelled to appear before a committee of this House appointed to investigate a question involving the existence of the Government, then it is for the House to determine when that power shall be exercised.

There was considerable debate following the report of this Committee. Those opposing the report of the Committee claimed that the appointment of electors was a state function, and that to inquire into it was an invasion of state sovereignty. The records of a State might not be thus taken by authority of Congress for they said:

There is no paper, and no record, that are no archives, there is no officer in the whole United States, not subject to the control of a committee of this House of Representatives. These resolutions propose not merely to arrest a private citizen of the United States and bring him before the bar of the House as a prisoner, but to take also a portion of the officers of the state government of Louisiana and bring them as prisoners to our bar to answer for contempt. . . . If you can take one state paper, you can take another state paper, if you can take one state officer, you can take another state officer, you may plunder the archives of my state or the adjoining state of Missouri, and bring them here to Washington to abide the action of this House upon them as a part of the report of your committee.

It was further asked:

What is the object of the production of these papers? It is not to enlighten Congress with a view to legislation. It is not to enlighten this House and enable us to determine whether it is expedient to submit to the people an amendment to the Constitution. The investigation does not relate to any act or duty to be performed by the House or Congress.

But it is said,

to ascertain how the vote of the State of Louisiana has been cast for electors for President and Vice President, and with a purpose that the two Houses of Congress may decide if the electors were duly appointed and authorized to cast their votes as they did for Rutherford B. Hayes for President.

The opposition to the resolution, however, denied that the House had any power to go into that question for the purpose indicated. The question, who were the duly appointed electors for President and Vice President for the State of Louisiana was, they held, by law intrusted to the State Board of Canvassers and their determination is final and conclusive.[1]

At the close of the debate the resolution was adopted. Those members of the canvassing board mentioned in the resolution were brought before the House and questioned.[2] They were allowed to make answers by a written statement in which they claimed that the laws of Louisiana were the authority for their appointment, that public records and documents of the government were not to be wrested from sworn custody by a subpoena, that to have surrendered the documents to the committee would have involved a violation of the sworn duties of the respondents; finally that the papers demanded had been deposited with the Secretary of State of Louisiana.

This statement was signed by the witnesses, but not sworn to. The Speaker said that the practice of the House had varied, but it had tended in the direction of requiring the oath. The point was waived, and the House adopted two resolutions [3] holding the witnesses in contempt and ordering them to be held in custody of the Sergeant at Arms until the

[1] 44th Cong., 2d sess., *Record*, p. 677.

[2] *Ibid.*, p. 1065.

[3] *Ibid.*, p. 1065.

further order of the House. They were also ordered to appear before the committee and produce the desired papers. In other words, they were to be kept in custody until they did produce the papers wanted by the committee.

On March 2, after a month's imprisonment, the following preamble and resolution were agreed to by the House:

> Whereas, all the investigations which have been directed by this House have been virtually closed, and no testimony can be taken by reason of the near adjournment of the House, and the further imprisonment of witnesses in contempt of the authority of this House can not conduce to the truth sought by said investigations, Resolved, That the Sergeant at Arms be directed to discharge this day all persons held by him under order of this House for contempt of its authority.[1]

A study of the above cases of recusant witnesses in the Louisiana investigation shows a wide extension in the power of the House to coerce testimony. It was held in these cases that although a subpoena *duces tecum* was broad and general in its terms, yet it was within the power of the House and its committees to issue such, where the subject matter could not be defined with any more particularity and that the issue of such subpoena was not restricted by the Fourth Amendment to the Constitution because the provisions of this amendment were not intended to apply to the issue of such process. In the course of its proceedings in these cases the House imprisoned the members of a State Canvassing Board for contempt in refusing to obey a subpoena *duces tecum* for the production of papers relating to the election of presidential electors and claimed moreover that where a state law " indirectly or by implication, undertakes to abridge the exercise of the powers of investigation of the House, it is in derogation of constitutional functions and to that ex-

[1] 44th Cong., 2d sess., *Record*, p. 2143.

tent absolutely void." So that once more we note the House justifying the exercise of wide powers of investigation and exercising its common-law power to punish witnesses for refusing to testify or to produce papers, regardless of the statute of 1857, although objected to by many members of the House as in utter denial of the personal rights and liberties of the citizen and contrary to several amendments of the Constitution.

Discussion as to the rules which should govern the admission of evidence before a legislative committee of investigation occurred in the investigation charges against L. F. Grover, a Senator from Oregon. On March 9, 1877[1] Mr. Grover presented a resolution to the Senate which mentioned the fact that certain charges had been made against him and he desired that they be referred to the Committee on Privileges and Elections "who shall thoroughly investigate and report on the foregoing charges, with power to send for persons and papers."

This resolution was amended in the debate in the Senate so as to direct the Committee on Privileges and Elections

> to appoint from its members a subcommittee of three, who shall take testimony relating to the matters referred to in said resolution and report to the full committee on the first Monday in December next and for such purpose such committee shall have power to sit in vacation; and if they deem it expedient, go to the State of Oregon; and such committee shall have power to employ a clerk, stenographer and Sergeant at Arms, and shall have all the powers of the General committee to administer oaths and send for persons and papers, and all the expenses of such committee, not exceeding $10,000 shall be paid out of the contingent fund of the Senate, upon vouchers to be approved by the chairman of such committee.

On June 15, 1878, the Committee submitted a report with

[1] 45th Cong., Special session, *Record*, p. 31.

a recommendation that the Committee be discharged, the evidence not, in their opinion, sustaining the charge.[1] However a member of the Committee, Mr. Saulsbury of Delaware, in views filed by him as part of the report, criticized the method of procedure of the Committee. He said in part:

The undersigned, as a member of the subcommittee charged with the duty of making the investigations required by the first mentioned resolution, begs leave to respectfully submit his own conclusions from evidence taken.

An examination of the testimony will show that the widest latitude was given to the investigation by the subcommittee. Witnesses were not restricted to matters within their own knowledge, but were allowed to testify as to their own beliefs and suspicions, unsupported by any facts, and to narrate hearsay evidence of no higher character than the fugitive rumors which are infrequently current on the streets of a state capitol preceding the election of a United States Senator.

It may be at times impossible for a legislative committee to apply to an investigation with which it is charged, the rules which govern the admissibility of evidence in courts of justice, but the undersigned must be allowed to express his conviction that in an investigation into the truth of the allegations affecting the personal honor of a member of the Senate, as well as his right to a seat in the body, no such wide departure should be allowed in the admission of testimony as the evidence in this case will show was permitted. While Senator Grover can have no cause to regret the latitude that was given the inquiry into matters alleged against him, or the regularity of his election, by reason of anything elicited against him or those to whom he owes his election to the Senate, it ought not to be allowed to become a precedent to govern similar investigations in the future.

The undersigned objected at the very outset to the latitude given in the investigation to the examination of witnesses which is usually allowed in investigations by legislative committees, and insisted on an observance as far as possible of the rules which

[1] 45th Cong., 2d sess., *Senate Rep. no. 540.*

obtain in courts of justice in that regard. Had his suggestion been adopted in practice, the testimony in this case would have been compressed into a very narrow compass and would have excluded a large mass of irrelevant testimony taken by the subcommittee.

The question arose in 1878 whether a Senate investigating committee could force a contumacious witness to testify or imprison him, when the Senate was not in session. Senator Mathews on June 5, 1878 asked through a resolution he submitted that a committee of seven Senators be appointed to inquire into certain charges against him and have power to send for persons and papers, to employ a clerk and a stenographer and have leave to sit during recess.[1] Soon after the committee began its investigation, Congress adjourned, (June 20, 1878). The committee called a Mr. Anderson, a most important witness, to testify. He asked to be represented by counsel, which request was denied by the committee. He then refused to answer any questions for the committee and they decided that in the absence of the Senate, they had no power to punish the witness for contempt in refusing to answer their questions.

This decision of the committee simply held that a committee of the Senate has no right to imprison a contumacious witness for contempt and is in line with the long established precedent of both Houses of Congress. There is no such thing as contempt of a committee, it is rather contempt of the House which appointed the committee and the procedure has always been for a committee defied by a witness to report the facts of the witness's contumacy to the House which appointed it, which could then summon the witness before its bar to answer for his contumacy and in case he persisted in his refusal to answer the questions of the committee, punish him for his contempt.

[1] 45th Cong., 2d sess., *Record*, p. 4119.

If Congress has adjourned as in this case, then committees of either House can only wait until the next session for certification of the facts of the witness's contumacy. While the Senate is a continuing body no distinction has ever been made between it and the House in this respect. This of course means that committees of either House of Congress can be handicapped for some time in securing testimony.

The question naturally arises in this connection, why couldn't a Congressional committee direct a federal marshal to keep a contumacious witness in custody until the House appointing it convenes again and takes action. It has never been done. In several Congressional investigations provision was made by joint resolution of both Houses or by special act for joint committees to report all refusals to attend or answer questions to the federal courts which could order the contumacious witness to answer and, in case of refusal, punish him for contempt of court.[1] However this was probably done to avoid the difficulties which joint committees of Congress and the two Houses of Congress had experienced in punishing contumacious witnesses in the usual manner.[2] Inasmuch as refusal to testify before a Congressional committee has been made a misdemeanor by the revised statutes there seems to be no reason why the Houses of Congress can not authorize their investigating committees to report the facts of contumacy to the federal courts which could order the contumacious witness to testify or punish him for contempt of court. The only question of doubt as to this procedure is that the statutes also provide that the facts concerning the contumacy of a witness should be reported to the Speaker of the House of Representatives or the President of the Senate as the case may be, whose duty it then is to

[1] See *supra*, ch. iii, pp. 184-188.

[2] *Ibid.*, pp. 184-186.

report such contumacy to the district attorney of the District of Columbia.[1]

On February 22, 1879, Mr. William M. Springer of Illinois, from the Committee on Expenditures in the State Department, made a report to the House with reference to the contumacy of George F. Seward. The report stated that the Committee had been empowered by resolution of the House to investigate the affairs of the State Department, past and present, with power to send for persons and papers; that a memorial had been referred to the Committee preferring charges of misconduct in office against George F. Seward, late Consul General at China and at this time, Minister to China. The Committee had failed to obtain certain books and papers and had then issued a subpoena *duces tecum,* commanding him to appear before the committee and produce, "all books, blotters, cashbooks, journals, and ledgers kept and used in the office of consul-general at Shanghai, China," and to testify touching matters of inquiry to said committee.

The report then showed that Seward appeared before the Committee and answered the inquiry of the Committee as to his willingness to produce the books, by submitting an argument by his counsel questioning the authority of the House to compel their production.

The Committee then adopted a set of resolutions citing that the books were public, not private, that they were necessary to the inquiry, that Seward had possession of them and illegally deprived the Committee of their use and finally that if he failed to produce them, he should be ordered to take two oaths, one, that he would make true answer to questions put to him concerning the possession, custody, etc. of the books, and second, that he would tell the truth. These oaths being administered to Seward, he stood silent in each

[1] See Appendix B, p. 434; also see discussion, *infra*, ch. v, pp. 203, 204.

case, after which his counsel presented an argument that Seward was protected by his constitutional guarantee that "no person should be compelled in any criminal case to be a witness against himself." This answer, of course, denied the efficacy of the subpoena. Seward's counsel also protested that Seward had not been heard on matters of fact presented to the Committee.[1]

The Committee after referring to the law in regard to witnesses summoned before committees, proceeded to show that an investigation before a Congressional committee is not a criminal case within the meaning of the Constitution. They said Mr. Seward was not a "party," instead of a witness, simply because counsel had been heard for and against him. The Committee was investigating, but not trying him. Therefore they recommended that the Speaker issue his warrant, directing the Sergeant at Arms to take Seward into custody and bring him before the House to show cause why he should not be punished for contempt, and in the meantime, keep Seward in his custody to await the further order of the House.[2]

The minority of the Committee did not agree with this report and submitted their own views to the House, holding that the inquiry was a criminal case within the meaning of the Constitution, and also arguing that the books were private and the witness should not be required to produce them; hence the Speaker should not issue his warrant taking Seward into custody. They said:

When distinct charges of the commission of offenses constituting high crimes and misdemeanors are preferred against a public officer and such charges are before a committee for investigation with reference to the exercise of the power of impeachment, conferred by the Constitution upon the House, and

[1] 58th Cong., Spec. sess., *Senate Doc. no. 11*, pp. 670-691.

[2] 45th Cong., 3d sess., *Record*, pp. 1770-1777, 2005-2016.

proceedings are conducted for the purpose of ascertaining his probable guilt or innocence of the offenses imputed to him, according to the forms of the law, there is presented a "criminal case" which is subject to the prohibition in the Fifth Amendment that, "No person shall be compelled in any criminal case to be a witness against himself." [1]

The order proposed by the Committee was adopted after debate in which the refusal of President Jackson to give information to a committee in 1837 was cited.

Seward was brought before the House and asked if he were willing to answer the questions of the Committee, in response to which he filed a written statement signed by himself and counsel, but not attested under oath. In this statement he contended: that the Committee was making the investigation with a view to his impeachment, and that the subpoena was void because of the constitutional guarantee; that this guarantee applied to legislative bodies as shown by *Ex Parte Emery* and that in this country parliamentary usage was subordinated to constitutional provision.

After his answer was heard, a resolution was offered in the House that he be held in contempt. The minority of the Committee reported a resolution submitting the question of contempt to the Committee on the Judiciary. This last resolution was adopted and Seward was discharged on his own recognizance to appear again when ordered.

On March 3, Mr. Benjamin Butler from the Committee on the Judiciary, made a report [2] on Seward's case holding that

investigations looking to the impeachment of public officers have always been finally examined before the Judiciary Committees of the House, so far as we are instructed, and it is believed that the case cannot be found as a precedent where the party charged,

[1] 45th Cong., 3d sess., *Record*, p. 1776.

[2] 45th Cong., 3d sess., *House Rep. no. 141*, p. 1774.

has ever been called upon and compelled to give evidence in such cases. We distinguish this case from the case of an ordinary investigation for legislative purposes, where all parties are called upon to give such evidence (oral or written) as may tend to throw light upon the subject of investigation, but even in those cases it was early held that a person called as a witness, and not charged as a party before the committee, was not bound to criminate himself, and a statute familiar to the House for the protection of witnesses under such circumstances, from having the evidence used against them was passed. . . . As a party to a contestation between the United States and himself, looking to his trial and punishment for alleged criminal transactions, he cannot be compelled to produce such books, nor answer concerning them for he is protected by the constitutional provision. . . . If the books are private they are not to be produced. Can a man's title to his private property be tried and decided against him collaterally so as to deprive him of his rights? Your committee think not.

The Committee further said that the Committee on Expenditures were mistaken in their procedure, that the final authority and custody of papers of the Executive Departments rests with the President, and a resolution requesting him to submit such papers would or should be accompanied by the clause: "If in his judgment not incompatible with the public interest." The mischief of the House's calling for documents might easily be a very great one, as in the case where the President might be engaged in negotiations with a foreign government and then be called upon by the House to spread upon its records such state secrets. The Head of the Executive Department therefore must be the judge in such cases and decide on his own responsibility.

The Committee finally reported that Seward had shown sufficient reason why he should not be sworn as a witness in the investigation of charges looking to his impeachment and recommended that Seward was not in contempt. The report was adopted by the House.

In the course of the investigation of the election of United States Senator Hon. J. J. Ingalls of Kansas, the Senate considered the case of three recusant witnesses, who having been arrested on attachment for refusal to appear at the time designated in the summons served upon them, were discharged when they had purged themselves of the alleged contempt.[1] Their appearances before the Senate provoked a lengthy discussion as to the serving of a warrant by a deputy and the serving of a subpoena in the same way. The question was also raised whether the Sergeant at Arms could make the return on a subpoena served by his deputy.

On June 2, 1879, in the Senate, Mr. Eli Saulsbury of Delaware from the Committee on Privileges and Elections, reported the following resolution for consideration: Resolved,

That the Committee on Privileges and Elections, to which have been referred memorials in relation to the election of United States Senator, Mr. J. J. Ingalls, a Senator elected by the Legislature of the State of Kansas, be and hereby is, authorized and instructed to investigate the statements and charges contained in said memorials; and for that purpose said committee is empowered to send for persons and papers, administer oaths, employ a stenographer, clerk and Sergeant at Arms, and to do all such acts as are necessary and proper in the premises. And said committee may appoint a subcommittee of its members to take testimony in Kansas or elsewhere in the case, which shall report the testimony taken to the committee in December next; and such subcommittee shall have the same authority to administer oaths and to do all other necessary acts as are herein conferred upon the full committee; and the said committee, and the subcommittee which it may appoint, may sit during the recess of the Senate for the purpose of making the investigation hereby authorized.

[1] 46th Cong., 2d sess., *Record*, p. 234, or 58th Cong., Spec. sess., *Senate Doc. no. 11*, pp. 692-693.

This resolution was agreed to and the following December the Committee reported a resolution in the Senate citing the failure of three witnesses to appear at designated times before the subcommittee and asking that an attachment be issued to the Sergeant at Arms directing him to bring the recusant witnesses before the bar of the Senate to answer for contempt of its process. The resolution was agreed to and the witnesses were forthwith brought before the House. In the course of their examination, debate developed as to the procedure of the committee. It seems that the subpoena signed by the Chairman of the Committee had been served by the Deputy of the Sergeant at Arms who had empowered him to make such service. The Sergeant at Arms, however made return of the service. The attachment, on the other hand, was signed by the Vice President of the United States and served by the Sergeant at Arms who took the witness into custody.[1]

It was argued by Mr. Hoar of Massachusetts that the Sergeant at Arms could not lawfully delegate the duty of serving a subpoena, and he cited the Massachusetts decision, Sanborn v. Carlton,[2] where it was held that a warrant issued by order of the United States Senate for the arrest of a witness in contempt, could not be served by a deputy. It was called to Mr. Hoar's attention however, that this decison referred to a warrant for arrest and not to a subpoena. The Committee had noted this distinction and had ordered the Sergeant at Arms to serve the warrant himself. However Mr. Hoar objected that the officer who served the subpoena should also make the return. He was answered that this was too strict a technicality inasmuch as the witness had acknowledged that he had been subpoenaed.

[1] For description of warrants and subpoena see *Record*, 46th Cong., 2d sess., p. 236.

[2] 15 Gray 399.

Finally all the recusant witnesses were discharged from the warrant, having declared their willingness to testify before the committee.[1]

Another case of the authorization by the Senate of the compulsory attendance of witnesses in legislative inquiries is seen in the adoption by it of the following resolution:

> Resolved, That the Committee on Claims be empowered to summon and examine witnesses to testify in regard to the claim of J. W. Wilbur for relief, now pending before said committee, and that in the consideration of said claim the committee be empowered to employ a stenographer to report the testimony, and that the necessary expenses of said examination be paid out of the appropriation for select and special committees.[2]

Immediately after the resolution was submitted, Mr. Morrill of Vermont said, "I should like to inquire of the Chairman of the Committee on Claims whether this is not a novel procedure and introducing a new feature into the legislation of the country?" The answer was that it had been customary for the Senate to authorize the Committee on Claims to investigate claims by calling witnesses before it. No further opposition was offered to the resolution and it was adopted.[3]

In 1886 there was an extended discussion in the Senate with reference to its relations to the executive caused by the refusal of the Attorney General to transmit to the Senate certain documents concerning the administration of the office of the District Attorney of the Southern District of South Alabama.[4] The papers which the Attorney General refused to transmit were those having "exclusive reference to the suspension by the President of George M. Duskin, the

[1] 46th Cong., 2d sess., *Record*, p. 241.

[2] 47th Cong., 1st sess., *Record*, p. 471.

[3] *Ibid.*

[4] 49th Cong., 1st sess., *Record*, pp. 1584, 1893, 1902, 2211, 2784-2814.

late incumbent," and he stated that it was not considered that the public interest would be promoted by a compliance with the request of the Senate.

The letter of the Attorney General refusing to hand over the documents was referred to the Senate Committee on the Judiciary which made a very detailed report on the obligations of the executive to transmit to Congress the documents called for, concluding with a resolution condemning the executive for this refusal.[1]

The following important points were made in the report:

The important question then is, whether it is within the constitutional competence of either House of Congress to have access to the official papers and documents in the various public offices of the United States created by laws enacted by themselves. It may be fully admitted that except in respect to the Department of the Treasury, there is no statute which commands the Head of any Department to transmit to either House of Congress on its demand, any information whatever concerning the administration of his department, but the committee believes it clear that from the very nature of the powers intrusted by the Constitution to the two Houses of Congress, it is a necessary incident that either House must have at all times the right to know all that officially exists or takes place in any of the departments of government. . . . The committee feels authorized to state, after a somewhat careful research, that within the foregoing limits, there is scarcely in the history of this government until now any instance of a refusal by a Head of a Department, or even of the President himself, to communicate official facts and information as distinguished from private and unofficial papers, motions, views, reasons and opinions, to either House of Congress when unconditionally demanded. Indeed the Journals of the Senate show great numbers of instances of directions to the Heads of Departments, as of course, to furnish papers and reports upon all sorts of affairs, both legislative and executive. The

[1] 49th Cong., 1st sess., *Senate Rep. no. 135* (printed in *Record*, beginning at p. 1584).

instances of requests to the President and commands to the Heads of Departments by each House of Congress from those days until now for papers and information on every conceivable subject of public affairs are almost innumerable, for it appears to have been thought by all the Presidents who have carried on the government now for almost a century that, even in respect of requests to them, an independent and coordinate branch of the government, they were under a constitutional duty and obligation to furnish to either House the papers called for, unless as has happened in very rare instances, when the request was coupled with an appeal to the discretion of the President with respect to the danger of publicity to send the papers, if, in his judgment, it should not be incompatible with the public welfare.

The minority of the Committee disagreed with the majority in a separate report, saying that every precedent cited in the report of the majority has for its foundation the constitutional power of the Senate to participate with the President in the official act to which the papers called for related, as for example, treaty making and appointment. But they held in this case, which is a matter of removal from office, "no such foundation, reason, or necessity exists."

President Cleveland himself replied to this statement of the majority of the Committee on March 1, 1886, challenging the attitude that because the executive departments were created by Congress the latter had any supervisory power over them, saying:

I do not suppose that the public offices of the United States are regulated or controlled in their relations to either House of Congress by the fact that they were created by laws enacted by themselves. It must be that these instrumentalities were created for the benefit of the people and to answer the general purposes of government under the Constitution and the laws, and that they are unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation.[1]

[1] 49th Cong., 1st sess., *Record*, p. 1902.

An allegation in the Washington correspondence of the *St. Louis Globe-Democrat* that twelve Senators and fifteen Representatives, pending the passage of an act entitled, "An act directing the purchase of silver bullion and the issue of treasury notes thereon, and for other purposes," approved July 14, 1890, were admitted to partnership in various silver "pools" by which they realized $1,000,000 profits in the advance in the price of silver following the passage of the said act, led to the adoption of the following resolution on January 21, 1891:[1] Resolved,

That the Speaker appoint a special committee of five members of the House, and that such committee be instructed to inquire into all the facts and circumstances connected with silver pools in which Senators and Representatives were alleged to be interested; also with the alleged purchase and sale of silver prior to and since the passage of the Act of July 14, 1890, including the names of the persons selling the same; and also who are owners of the twelve million dollars of silver bullion which the United States is now asked to purchase. And for such purposes it shall have the power to send for persons and papers and administer oaths and also shall have the right to report at any time. The expenses of said inquiry shall be paid out of the contingent fund of the House upon vouchers approved by the Chairman of said Committee, to be immediately available.

On January 29, 1891[2] Mr. Nelson Dingley of Maine, Chairman of said special committee, reported that J. A. Owenby had been duly summoned to appear before the committee, that service was duly made on him, but that he had refused or neglected to obey the subpoena. In his report he also stated that Owenby was a material witness, inasmuch as the correspondent of the paper making the charges against members of the House in connection with the alleged pool

[1] 51st Cong., 2d sess., *Record*, pp. 1196-1208.

[2] *Ibid.*, pp. 1973, 1976.

in his testimony stated that Owenby was the authority for what he had stated, and claimed to have personal knowledge of the facts alleged. The report was accompanied by copies of the subpoena, the return of the deputy Sergeant at Arms, and certificate of his appointment.

After submitting his report Mr. Dingley suggested that the House adopt the following order: Ordered,

That the Speaker issue his warrant directing the Sergeant at Arms attending this House, or his deputy, commanding him to take into custody forthwith, wherever to be found, the body of J. A. Owenby, and bring him to the bar of the House, to show cause why he should not be punished for contempt; and in the meantime keep the said J. A. Owenby in his custody to await the further order of the House.

In the ensuing debate on this order, Mr. Dingley stated that this proceeding was proposed in accordance with the uniform precedents of the House. Before the debate was finished, the above resolution was modified by prefixing to it the following: "Whereas the special committee appointed by the House to investigate alleged silver pools presented the following report, to wit" (here the full report follows). It was then adopted.

On February 2, the Sergeant at Arms appeared at the bar of the House having in custody the body of J. A. Owenby, who was arraigned and questioned as follows by the Speaker: "Mr. Owenby, you have been arrested for contempt of the House in disobeying its summons. What have you to say in excuse therefor?" After Owenby had made an oral answer to the House, not under oath, the Speaker asked him, "Are you now ready to appear before the Committee?" Owenby said he was and Mr. Dingley offered the following preamble and resolution to the House, which was adopted:

Whereas J. A. Owenby has been heard by the House pursuant to the order made on the 29th day of January 1891, requiring him to show cause why he should not be punished for contempt for refusing or neglecting to respond to the subpoena named in said order by obeying the same, and has stated to the House that in purging himself of the contempt for which he is in custody, he is now ready to obey said subpoena; Therefore, Resolved, That the said J. A. Owenby shall have the privilege to appear forthwith before said committee of the House to investigate alleged silver pools, etc. and testify touching matters of inquiry before said committee; and that in the meantime the said J. A. Owenby remain in the custody of the Sergeant at Arms under said order until the further order of the House.[1]

Subsequently Owenby appeared before the committee and testified, whereupon a resolution was adopted by the House, discharging him from the custody of the Sergeant at Arms.[2]

On February 25, 1891, Mr. Dingley made the final report of the committee, which emphasized the fact that Owenby was untruthful, that he had absolutely no basis for the statements he had made and that the allegations contained in the *St. Louis Globe-Democrat* were wholly false. The report further censured the practice of certain Washington newspapers in printing charges and statements for which there was no basis in fact. No action was proposed or taken on the report.

This case is chiefly important in this study in that it illustrates some new developments in the procedure for arresting and arraigning a contumacious witness. In the first place, it should be noted that the committee in reporting the con-

[1] 51st Cong., 2d sess., *Record*, pp. 2068-2150.

[2] There have been many cases in the House and the Senate where witnesses have refused to give testimony before committees and after arrest, have agreed to testify. For list of precedents in the Senate from 1857-1892, see 52d Cong., 2d sess., *Senate Misc. Docs.* Ser. No. 3070, pp. 46-73.

tempt of the witness, showed that the testimony required was relevant, and also presented copies of the subpoena and the return. The point was made that a subpoena having been served by a deputy Sergeant at Arms, a certificate of his appointment should accompany a report requesting arrest of the witness for contempt. In this case it was not thought necessary that mileage and fees should be tendered a witness before arresting him for contempt in declining to answer.

It will be noted also that in ordering the arrest of the witness for contempt, the House included in a preamble the report of the committee showing the alleged contempt. When the witness was arraigned he was allowed to answer orally and without being sworn; promised to appear before the committee and the House gave him permission to do so, but did not discharge him from custody until the committee reported that he had purged himself.

Because it was stated in the *New York Sun* and *Philadelphia Press* that bribes had been offered to certain Senators to influence their vote on the pending tariff bill,[1] and that the sugar schedule had been made up in consideration of large sums of money paid for campaign purposes of the Democratic Party, a resolution was adopted by the Senate on May 17, 1894[2] ordering that a Committee of five Senators be appointed to investigate these charges and to inquire further whether any contributions had been made by the sugar trust, or by any person connected therewith, to any political party for campaign or election purposes, or to secure or defeat legislation, and whether any Senator had been or was speculating in what were known as sugar stocks during the consideration of the bill then before the Senate, and with power to send for persons and papers and to administer oaths.

On May 25, 1894, Senator Gray, of the Special Com-

[1] Wilson Gorman Bill.

[2] 53d Cong., 2d sess., *Record*, pp. 4848-4851.

mittee, made a unanimous report,[1] stating that the Committee found nothing in its investigation to impeach in the slightest degree the honor or character of Senators Hunter and Pyle. On May 29,[2] Senator Gray made a further unanimous report with respect to two contumacious witnesses, E. J. Edwards and J. S. Schriver, in which, after stating the facts in respect to their appearance before the special committee and their refusal to answer certain questions propounded to them, the committee said:

> In the opinion of the Committee each of the questions put to each of said witnesses was a proper question, and pertinent to the question under inquiry before the Committee, and was necessary to make the examination ordered by said resolution of the Senate, and that each of said witnesses is in contempt of the Senate and merits to be dealt with for his misconduct; and that each of said witnesses, by his various refusals to answer the questions as herein set forth, has violated the provisions of that certain act of Congress in such cases made and provided, being Ch. 7 of the Revised Statutes of the United States.

The Committee recommended that the contumacious witnesses be dealt with as the statutes provided. Later on E. R. Chapman, H. O. Havemeyer, J. E. Searles, John W. Macartney and Allen S. Seymour were reported to the Senate as being in contempt for refusing to answer pertinent questions, with the recommendation that the facts of their refusal be certified to the District Attorney of the District of Columbia as provided for in the statutes.[3]

All of these contumacious witnesses were indicted by the grand jury of the District of Columbia for a misdemeanor under the statutes and on demurrer to the indictment their cases were considered first in the Supreme Court of the Dis-

[1] 53d Cong., 2d sess., *Senate Rep. no. 436.*

[2] 53d Cong., 2d sess., *Senate Rep. no. 437.*

[3] *Ibid., nos. 477, 485, 486, 487, 624.*

trict, then in the Court of Appeals of the District and finally in the Supreme Court of the United States.[1]

The final and complete report of the Committee was made on August 2, 1894.[2] In its report the Committee stated that it considered that there were five distinct matters with the investigation of which the committee was charged:

First, Whether bribes had been offered to certain Senators to induce them to vote against the pending tariff bill;

Second, Whether, as charged in the *Philadelphia Press,* the sugar schedule had been made up in consideration of large sums of money paid for campaign purposes of the Democratic Party.

Third, Whether any contributions had been made by the sugar trust, or any person connected therewith, to any political party for campaign purposes or election purposes or to secure or defeat legislation.

Fourth, Whether any Senator had been or was speculating in what are known as sugar stocks during the consideration of the tariff bill then before the Senate.

Fifth, To investigate and report upon any charge or charges which might be filed before the Committee alleging that the action of any Senator has been corruptly or improperly influenced in the consideration of said bill, or that any attempt had been made to so influence legislation.

As to the first matter, they found absolutely no evidence of corruption among the Senate. As to the allegations in the *Press,* they sought immediately the author of these statements, who proved to be E. J. Edwards. He appeared before the Committee and, after being sworn, stated that he had no personal knowledge of any of the statements made in the *Press.* He stated that he made them on the authority of an informant, whose name he refused to tell the Committee,

[1] For full discussion of these cases see *infra,* ch. vi, pp. 358-361.

[2] 53d Cong., 2d sess., *Senate Rep. no. 606.*

whereupon, as already mentioned, he was cited to the Senate for contempt.

Schriver, another contumacious witness, also a correspondent for the *New York Sun,* stated that the information he had received and caused to be published in the Sun, was based on the statements made to him by a certain Congressman. He refused to divulge his name to the Committee.

Havemeyer and Searles, the President and Secretary-Treasurer of the American Sugar Refining Company respectively, were asked whether the said corporation had made any contributions to the political campaign funds of any political party in 1892 or 1893 and they answered that it had made none to any national committee, but had made some to state and local committees in several states. Being asked the amounts they declined to answer, which led to their being held in contempt, although they did say that no contribution had been given for the purpose of securing or defeating legislation in Congress, or to aid in the election of any United States Senator, or for any other improper purpose.

Chapman was a member of a stock broker's firm in New York City, and he refused to tell the Committee whether any Senator had speculated in sugar stocks through his firm. The remaining witnesses, Seymour and McCartney, also refused to answer questions of the Committee.

The Committee in its report gave the sugar trust a clean bill of health, claiming that no improper contributions had been found. This part of the report is probably accounted for by the fact that a majority of the Committee were Democratic and the contributions had been given to the Democratic Party, although the Committee did report that they

> strongly deprecated the importunity and pressure to which Congress and its members are subjected by the representatives of great industrial combinations, whose enormous wealth tends

to suggest undue influence and to create in the public mind a demoralizing belief in the existence of corrupt practices.

It should be noted that in additional views appended to the regular report of the Committee, the Republican members of the Committee, Mr. H. C. Lodge, G. K. Davis, and W. V. Allen, stated their belief that the contributions of the sugar trust accomplished exactly what was planned, namely, to influence the adoption by the Senate of a favorable sugar schedule.

Mr. Allen in a separate statement took occasion to deplore the attitude of many of the witnesses appearing before the Committee. He said:

It is proper to call attention to the reckless and open defiance of the authority of the Senate to require witnesses to answer questions that may be put to them, or make disclosures germane to the subject matter of investigation. The defiance of our authority by these witnesses demonstrates to me that if the Senate ever expects to arrive at the truth of any matter under investigation by any committee appointed by it, it must promptly take contumacious witnesses in hand, and deal with them without delay as they would be dealt with in a court of justice under like circumstances.

To turn such witnesses over to the grand jury of the District of Columbia for indictment and prosecution and not require them to be brought before the bar of the Senate to purge themselves of contempt, and failing to do so, punish them for refusal, is practical abdication of the authority of the Senate, and leaves it possible for irresponsible persons, without any risk to themselves, to make serious charges against the integrity of those in authority, and when called upon to disclose their knowledge of the facts to hide themselves behind the assertion that there is no authority in the Senate to compel the disclosures.

The Senate has ample and undoubted jurisdiction of this matter and has repeatedly asserted it, and can punish witnesses for contempt and incarcerate them until they purge themselves

thereof; but so long as partisan politics enter into the discussion and consideration of investigations of this character, the people can expect such witnesses to escape unpunished, and no one knows this better than the witnesses themselves. Thus it will be seen that under such circumstances investigations of this character eventuate into nothing. There must be a radical reform in this respect before the public can expect Congressional investigations to be of any practical value.

The reform Senator Allen advocated was that a law should be speedily passed which, when a committee reports that a witness duly summoned before it, is recalcitrant or refuses to answer germane questions put to him by the committee, will require him to be brought before the bar of the Senate, and there, without delay or unnecessary debate, the Vice President or presiding officer shall repeat the questions to him, and if he then shall refuse to answer them, he shall, by proper resolution, without delay or debate, be placed in confinement until he shall have purged himself of contempt. Senator Allen believed that unless laws of this character could be enacted and be promptly and in good faith enforced, all Congressional investigations would be failures and fall short of accomplishing any useful or practical purpose.[1]

In the demurrers to the indictments in these cases of contempt, briefs were filed for the witnesses by their attorneys denying the right of the Senate to punish them under the statutes and claiming that the statutes were unconstitutional. They moreover claimed that Congress had no jurisdiction in an investigation of the subject matter included in this investigation. Kilbourn v. Thompson was freely cited as denying the power of Congress in the premises. However both the Supreme Court of the District, the Court of Appeals and finally the Supreme Court of the United States upheld the power of the Senate, denied that section 102 of the Revised

[1] 53d Cong., 2d sess., *Senate Rep. no. 606.*

Statutes was unconstitutional, and said that the Senate had the power to compel answers to the inquiries which the witnesses refused to answer,[1] thus sanctioning the common-law power of the Houses of Congress to punish for contempt as well as its statutory power.

This investigation shows a departure from previous proceedings. Instead of taking contumacious witnesses into custody and holding them until they had purged themselves of their contempt, the committee recommended that they be punished according to the statutes without giving them a chance to clear themselves of the contempt.

The testimony taken in this case shows how often the Senate or the House instituted investigations on the basis of groundless charges in newspapers and how the time and money of Congress and the people were consumed in fruitless proceedings. The influence of large corporations and their contributions to the campaign fund of political parties is also clearly shown in this investigation, in spite of the report of the committee.

However the chief importance of this investigation to our study is that it led to a declaration by three different courts on the inquisitorial power of Congress. These court decisions are fully discussed elsewhere.[2]

On February 1, 1904, Senator Charles H. Dietrich of Nebraska, having been indicted by a grand jury in Nebraska for an alleged violation of the laws of the United States, on a trial of the indictment before a Federal Court at Omaha, was discharged by the judge without the cause being heard upon its merits, upon the ground that his acts were no violation of the federal law. He asked the Senate for investigation to clear his name, and the Senate immediately approved a resolution providing for the appointment of a select com-

[1] See discussion *infra*, ch. vi, pp. 358-361.

[2] *Ibid.*

mittee of five to investigate the facts in the case.[1] The committee was given the usual authority to send for persons and papers and administer oaths.

On April 14,[2] Mr. Platt presented the report of the committee which cleared Mr. Dietrich of the charges against him. As to the method of procedure the committee said:

> The committee with the consent of Senator Dietrich in order that no possible fact bearing upon the matter might be overlooked, received the statement of all witnesses in full, not regarding strictly the rules of evidence in that respect. It will appear that the committee with such consent of Senator Dietrich, admitted not only such evidence against him as would be competent in a court of justice, but also a good deal of hearsay testimony—being all that was brought to their attention—as a possible clue to further information. The committee did not determine how far this proceeding would have been justified for any reason without such consent, even if they had carefully refrained from attaching any weight to it in their final decision; but it, in fact, did not tend in the least to shake or affect the conviction they have reached.

The more important recent cases involving the question of the inquisitorial power of Congress have been considered elsewhere in this study.[3] There is no point in giving any further exposition of the debates in Congress referring to this subject as the questions brought up and discussed in the debates have been those already mentioned. Inquisitorial investigations are still strenuously opposed and on the grounds already described.[4]

Of course there have been innumerable investigations con-

[1] 58th Cong., 2d sess., *Record*, p. 1447.

[2] 58th Cong., 2d sess., *Record*, p. 4800.

[3] See cases of Marshall *v.* Gordon, *ex parte* Daugherty, and other court decisions discussed in ch. vi.

[4] See debate on Report of Aluminum Co. of America, etc., Senator Cumming's speech. *Cong. Record*, Feb. 23, 1926, pp. 4391, 4393, 4394.

ducted by both Houses of Congress in the last fifty years where the power to send for persons and papers has been granted and used without protest. That recent years should witness an increase in the use of the investigating power by Congress is to be expected. The rapid industrial development of the country since 1890, the great increase in population and the acquisition of new territory have certainly brought new problems for Congress to deal with. Then too the rapid "nationalization" of the country has called for the creation of numerous administrative commissions, bureaus and boards by Congress which would naturally have to keep a watchful eye on their activities in order to correct mismanagement and uncover abuses which might be eliminated by the enactment of new legislation. This is primarily due to the lack of articulation between the legislative and executive departments.

A brief statement of some of the more important investigations of recent years shows the wide range of Congressional activity in this respect. For example, the expenditures of the executive departments have been subjected to the closest scrutiny by both the House and the Senate as may be seen from the following description. On January 5, 1876 the House authorized its Committee on Expenditures in State, Treasury, War, Navy, Post Office, Interior, Justice and Public Buildings to investigate the method of issuing vouchers, and to ascertain what retrenchment could be made, what abuses existed and what unnecessary offices were in existence. The Committee was also given power to send for persons and papers.[1] In 1884 the House Committee on Expenditures conducted a similar investigation in the Department of Justice. This Committee was given power to send for persons and papers.[2] By resolution of January 24,

[1] 44th Cong., 1st sess., *Record*, p. 268 (1876).

[2] 48th Cong., 1st sess., *Record*, p. 349 (1884).

1876 the Senate Committee on Finance was instructed to investigate the accounts of the Treasury Department and was given power to send for persons and papers.[1] A resolution of December 31, 1895 authorized the Senate Committee on Naval Affairs to inquire into prices paid for armor plate.[2] More recently might be noted the resolution of October 11, 1919 authorizing the Senate Committee on Public Buildings and Grounds to investigate construction, operation and maintenance costs of public buildings.[3] This resolution included the power to send for persons and papers. During this investigation numerous subpoenas were issued. The Committee limited its inquiry to the United States Housing Corporation which it recommended should be abolished.[4]

The question of the reorganization of the executive departments has been a frequent subject for investigation. For example, a Senate resolution of April 30, 1917 gave the Committee on Military Affairs power to send for persons and papers on any subject pending before it.[5] It proceeded to investigate aircraft production and reported important recommendations, among them being that the work be taken away from the Signal Corps. On June 9, 1921 a Senate resolution authorized a committee to investigate the government bureaus extending relief to incapacitated soldiers, and for this purpose it was given power to send for persons and papers.[6] Another Senate resolution of March 2, 1923 authorized a committee to investigate leases and contracts executed by the Veterans' Bureau and it was given power to

[1] 44th Cong., 1st sess., *Sen. Rep. no. 371*, Ser. No. 1668.

[2] 54th Cong., 1st sess., *Record*, p. 432 (1895).

[3] 66th Cong., 1st sess., *Record*, p. 6703 (1919).

[4] 66th Cong., 2d sess., *Sen. Rep. no. 336*, Ser. No. 7650.

[5] 65th Cong., 1st sess., *Record*, p. 1569 (1917).

[6] 67th Cong., 1st sess., *Record*, p. 2302 (1921).

send for persons and papers,[1] and finally there is the investigation of the Department of Justice made in 1924 by a Senate Committee headed by Senator Brookhart.[2]

Further specific account of the investigating activities of Congress is unnecessary at this point. Suffice it to say that Congress has used this power in the exercise of its whole range of legislative activities. In recent years investigations have sometimes seemed to constitute the major activity of the Houses of Congress. For example, during President Wilson's last two years, fifty-one Congressional investigations were in progress.[3]

There has been one interesting change in the position of the two Houses of Congress with respect to recent investigations. Whereas, the House was formerly the "grand inquest" of the Nation and conducted most of the more important investigations, the tables have been turned and now the Senate is the grand inquisitor. The stricture now placed upon the procedure in the House has served to curb its investigating activities until it has become impotent, while on the other hand the Senate, having better publicity methods and not being restricted by closure, has become the watchdog of the Nation and can and will investigate any matter of potential importance.

Our conclusions with respect to the power of Congress to make investigations and punish for contempt as shown by a study of the proceedings of both Houses are as follows:

The source of the legislative power to make compulsory investigations and punish for contempts is found in the transfer of the elements and principles of the Parliamentary Law of England to America, where the Colonies adopted this power

[1] 67th Cong., 4th sess., *Record*, p. 5102 (1923).

[2] 68th Cong., 1st sess., *Record*, p. 3409.

[3] Rogers, *The American Senate* (New York), 1926, p. 202, see speech of Senator Carter Glass, *Cong. Record*, April 15, 1924, p. 6358 *et seq.*

and conducted their proceedings in such cases according to the mode used by the Houses of Parliament. These colonial assemblies adopted and acted upon the doctrine that the Law of Parliament was part of the inheritance of Englishmen, brought with them to the Colonies, and as fully in force as the common law which accompanied their migration. The continued need for the use of this power in order to acquire information essential to wise legislation and to maintain the effectiveness of legislative proceedings resulted in its repeated exercise by the colonial assemblies and later by the state legislatures until by the time the Federal Constitution was adopted, its use was considered an essential and inevitable concomitant to the efficient functioning of the legislative department.[1]

When the Federal Government was organized, attempts were made to define this power in the new Constitution, but nothing was done. Therefore the Congressional power of compulsory investigation, that is, the power to issue subpoenas, compel testimony and the power to punish for contempt is merely implied in the Constitution, for there is not a word in that instrument which specifically grants to Congress or either House the right to exercise this power. The clauses in the Constitution which were considered as offering a basis for the inference of this power were the following:

1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.[2]

2. The House of Representatives shall choose their Speaker and other officers and shall have the sole power of peachments.[2]

[1] *Cf.* discussion in ch. i.

[2] The Federal Constitution, Article I, sec. 1.

[3] *Ibid.*, Art. I, sec. 2.

3. The Senate shall have the sole power to try all impeachments.[1]

4. Each House shall be the judge of the elections, returns and qualifications of its own members.[2]

5. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member.[3]

6. Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.[4]

It has always been the common contention in Congress that Art. I, section 1, of the Federal Constitution in conferring the legislative power on Congress, also granted all those powers ancillary to it, which were necessary in order to enable Congress to legislate efficiently, and this included the compulsory power of investigation and the power to punish for contempt. In substantiating this claim, its advocates pointed to the precedents of the English Parliament and of the Colonial and State Legislatures.

It may be true that the framers of the Constitution considered it unnecessary to confer this power on Congress, as its use by that time was deemed so inseparable from a proper functioning of the legislative branch, that the mere fact of making provision for Congress in the Constitution carried with it the understanding that this power would be used as the need developed. This construction of the legislative power, together with the fact that Parliament had never chosen to define its privileges lest afterwards a new case

[1] The Federal Constitution, Art. I, sec. 3.

[2] *Ibid.*, Art. I, sec. 5.

[3] *Ibid.*, Art. I, sec. 5.

[4] *Ibid.*, Art. I, sec. 9.

arise that did not come within the rules, thus foreclosing their ground against the offender, seems the most plausible explanation of the silence of the Constitution.

It has often been said in Congress that the power to punish for contempt must always be a matter of sound discretion, to be determined by the House concerned, in referance to the particular case.[1]

The difficulty with this interpretation of the investigative power of Congress was that it claimed for Congress the right to exercise judicial power, as the issue of compulsory process in investigations, the trial of contumacious witnesses and punishment for contempt were plainly exercises of judicial functions. This issue was made especially clear because the Constitution clearly conferred certain judicial powers on Congress, but granted all others to the judicial branch of the Government. Moreover, Congress is a body of enumerated powers and could, in the strict interpretation of such powers, exercise only those specifically granted.

Those who took the narrow view of the Constitution held that Congress could not exercise the compulsory power of investigation where it had not received a judicial grant, as this was contrary to the plain purpose of the Constitution which was to separate the powers of Government. So when Congress inquired into the election of members, conducted impeachment proceedings, or investigated cases of bribery, libel, alleged misconduct of members and in general any obtrusive interference with its proceedings, it could constitutionally exercise the power to compel testimony and punish for contempt, but when it sought to use this power in aid of the enactment of legislation, it was usurping powers not granted by the Constitution.

Such complaints as the following were heard in Congress, practically every time the use of this power was suggested;

[1] See *supra*, pp. 46, 80, 114, 166.

if this House proceed to make the law, accuse and condemn for the breach of it, and to execute such judgment by imprisoning the offender, such a course would be the combining and exercising the powers of the three departments of Government by the one, and this is the summation of tyranny.

The fact that both Houses of Congress frequently *permitted* persons tried for contempt before them to have counsel and compulsory process to obtain witnesses in their behalf and even allowed witnesses testifying before their committees to have counsel, indicates the quasi-judicial character of these proceedings. There is no doubt that the use of this power by Congress was in defiance of the letter of the Constitution and an infringement upon the doctrine of the separation of powers of government. As we have already shown the debates in Congress show continued protest against the exercise of this power on these grounds. But the use of this power was, for these reasons, not only strenuously opposed in Congress but also to some extent by the courts and the executive department.

The decisions in Kilbourn v. Thompson, *In re* Pacific R. R. Commission, *Ex parte* Daugherty clearly indicate a restrictive attitude on the part of the judicial department.[1]

The numerous investigations of the executive departments, the unlimited demands for papers and close check-up of the Executive in general were a source of constant irritation and inconvenience to him, as well as a device for placing him in a subordinate position to the legislative department. Many instances have been shown in our study where a conflict of power has developed between the executive and legislative departments over this question.[2]

The complaint of President Jackson on this account is

[1] See *infra*, ch. vi.

[2] See *supra*, ch. ii, p. 42, ch. iii, pp. 134-142, 144, 146, 167-170, ch. iv, p. 258.

classic.[1] Similarly President Buchanan protested against a House examination of the executive departments as follows: "The whole proceeding justifies the fears of the wise and great men who before the Constitution was adopted by the States, apprehended that the tendency of the government was to the aggrandizement of the legislative at the expense of the Executive and Judicial Departments."[2] President Coolidge, in objecting to the action of a special investigating committee appointed by resolution of the Senate March 12, 1924 to investigate the Bureau of Internal Revenue, called the exercise of this power an unwarranted intrusion and said:

> Whatever may be necessary for the information of the Senate or any of its committees in order to better enable them to perform their legislative or other constitutional functions ought always to be furnished willingly and expeditiously by any department. But it is recognized both by law and custom that there is certain confidential information which it would be detrimental to the public service to reveal.[3]

In still other cases the executive departments have complied with the demands of investigating committees, but have made strenuous protests at the same time.[4]

The House of Representatives has never doubted its power to investigate the administrative departments of the government and it has conducted such investigations by the wholesale ever since the Federal Government was organized. In fact the House has often claimed that it was the grand inquisitor of the Nation, and that it was its duty to examine into the conduct of public officers. It has often been claimed

[1] see *supra*, ch. iii, pp. 134-142.

[2] See *supra*, ch. iii, pp. 167-170.

[3] 68th Cong., 1st sess., *Record*, April 11, 1924, p. 6087.

[4] See *infra*, ch. vi.

that the House has a broader basis for the assumption of this power than the Senate, for it is charged with the duty of initiating bills for raising revenue and of bringing impeachment proceedings which it cannot do without the preliminary step of investigation. The power of the House in the latter respect is comparable with the presentment of a grand jury.[1]

The Senate cannot investigate by virtue of its authority in impeachment proceedings for it acts only as a trial court in such cases. Hence it is clear that the power of the Senate to investigate the administrative departments of government is not found in its impeachment power and because of this many authorities have denied the power of the Senate to make these investigations.[2] However, in collaboration with the House of Representatives, the Senate is charged with the constitutional duty of enacting legislation and in order to perform this function efficiently, it must have access to all information which will aid it in this respect. The necessity for the use of the power of compulsory investigation in obtaining information requisite to wise legislation has long been admitted in both Houses of Congress. It should be remembered that Congress established the administrative departments of the Federal Government by appropriate legislation and that cases of maladministration thus call for in-

[1] In this connection it should be noted that in an investigation preliminary to impeachment proceedings the House of Representatives has decided that it does not have power to compel the person charged to give criminating testimony, in other words some of the "guaranties of a fair trial" are believed by the House to apply in such cases. See *supra*, ch. iv, pp. 252, 253, George Seward's case.

[2] For example Professor J. H. Wigmore holds (19 Illinois Law Review 452) that senatorial investigations repudiate the constitutional mode of impeaching executive officials. However it might be said in answer that the Senate can conduct these investigations only with an ostensible legislative purpose and hence is not restricted by the "guarantees of a fair trial."

formation whether there is need for further legislation respecting them. On this ground the Senate, as well as the House of Representatives, has undoubted authority to investigate cases of maladministration in the executive departments. Also it may well be that the constitutional authority of the Senate to share in the treaty-making and appointing power of the Executive gives it as wide a constitutional base for investigation of the executive departments as the House has under its power to initiate appropriation bills.[1] The Supreme Court of the United States has recently declared that there is no difference between the power of the House of Representatives and the Senate in this respect.[2]

The question arises in this connection, may the Senate investigate the administrative departments when it does not clearly declare that the investigation is for purposes of legislation; in other words, in a resolution establishing an investigating committee, must it avow a legislative intent? Judging from the tenor of the decision of the Supreme Court in McGrain v. Daugherty, the Senate would escape all doubt of constitutionality by declaring a legislative purpose. However if the Senate were restricted in its investigations to cases where there is an avowed legislative purpose, it would be forced to pass upon the desirability of legislation before the facts of the situation were known.

Probably the House has a wider point of departure in this respect than the Senate for when it authorizes an investigation without specific declaration of a legislative purpose, it may be an investigation preliminary to legislation, or in anticipation of impeachment proceedings. It is not clear whether the House, in authorizing an investigation preliminary to impeachment proceedings, must speci-

[1] See debates on removal from office of George M. Duskin, 49th Cong., 1st sess., *Record*, p. 1584 *et seq.*

[2] McGrain *v.* Daugherty, 273 U. S. 135, fully discussed *infra*, ch. vi.

fically state that such is the purpose of the investigation or not.

Whatever the differences in constitutional authority of the Senate and the House of Representatives to conduct investigations of the administrative departments may be, the fact is that the Senate has made the prosecution of such inquiries a popular pastime for a considerable length of time. In fact, as already suggested, the Senate has become in recent years a much more important investigating medium of the administrative departments than the House of Representatives.

In a recent letter to the writer, Senator Thomas J. Walsh, who has been the recognized leader in most of the more important Senate investigations of recent years, said:

> Several reasons have operated to give prominence to investigations conducted by the Senate. In the first place the Senate is the more popular body. Newspaper reporters assert that the Senate proceedings furnish more news than those of the House. This is due largely, I dare say, to the greater freedom allowed under the rules of the Senate. One important factor is that the so-called insurgents in the Senate desiring an investigation can get it with the aid of the Democrats: the Democrats desiring an investigation can get it with the aid of the insurgents. In the House the insurgent contingent is relatively much smaller. Finally the personal equation enters into the problem.[1]

Professor Lindsay Rogers in his admirable study of the Senate says: "Party control is now so strong in the House of Representatives as to shut that body off from embarrasing inquiries into executive performance."[2] This statement is easily proved by the recent Teapot Dome and Veterans' Bureau disclosures, for before the Senate so effectively

[1] Walsh, Thomas J., U. S. Senator, letter to writer, November 14, 1927.

[2] Rogers, Lindsay, *op. cit.*, p. 202. See also Hasbrouck, Paul D., *Party Government in the House of Representatives*, p. 224.

uncovered these scandals a partisan rules committee of the House had refused to authorize such investigations.[1]

It cannot be doubted that the supremacy of the executive department has at times been seriously challenged by these investigations and that they have produced a seemingly endless series of disputes between Congress and the Executive as to the rights of each department of government in such cases.[2]

That these investigations have often been very successful and most invaluable in our federal system of government is proved by the number of cases of maladministration which have been unearthed due to their use.[3] Moreover Congressional investigations of this sort have furnished a basis for wise legislation and, too, have served to educate and inform the public.[4] Further evidence of the need for such investigations is seen in the fact of the separation of the powers of government and the consequent lack of articulation between the executive and legislative departments.[5]

On the other hand these investigations are sometimes little more than fishing expeditions which collect "irrelevant material and pour into the record rumor and innuendo along with pertinent testimony." Political advantage is seldom lost sight of in these investigations. Special committees created for the purpose of investigating unusual conditions

[1] Bryce, *American Commonwealth*, p. 161 (1912 ed.) says, "The House committees are not certain to detect abuses or speculation, for special committees of the Senate have repeatedly unearthed dark doings which had passed unsuspected the ordeal of a House investigation."

[2] On the right to demand papers upon the executive files, with an extensive list of precedents since 1789, see 52nd Cong., 2d sess., *Senate Misc. Docs.*, vol. vii, pp. 232-272.

[3] See *supra*, ch. iii, pp. 148, 149, 186, 187, 198; also ch. iv, pp. 271; also *infra*, ch. vi, p. 366.

[4] *Cf.* Wilson, *Congressional Government*, p. 303.

[5] Rogers, *op. cit.*, pp. 191-213.

are thoroughly awake to the possibilities of making political capital.

It is also true that Congressional committees in their ardor to investigate have at times pushed their demands to a point where compliance with them would have interfered with the Executive in the discharge of his constitutional duties. It would seem that the Executive is justified in resisting, therefore, any demand when it is believed that compliance therewith would be incompatible with the public interest. Members of Congress have frequently admitted this point.[1] The decision of the Executive in the case of a dispute must necessarily be final. The question would not be justiciable and the infliction of punishment by one co-ordinate branch upon the other would be wholly repugnant to the constitutional scheme. The Executive, no less than Congress, is accountable directly to the people and the ultimate decision must rest in such matters with the electorate.

So-called judicial investigations, that is, those based on one of the enumerated or implied privileges of Congress, were generally authorized by the Houses of Congress without much opposition. Similarly, investigations into the administration of the law, or the condition of the executive departments, were also submitted to without much opposition in Congress. However, investigations not referring to the administration of the law, but for the sole purpose of acquiring information relative to the enactment of legislation, such as an investigation preliminary to the enactment of a tariff law, were always bitterly opposed in Congress on the grounds that such an investigation represented the assumption of judicial functions without constitutional sanction. However, as we have seen, the House of Representatives made an investigation of this type as early as 1827 and the Senate by 1859. In fact, as reference to Congressional

[1] See *supra*, ch. iv, pp. 252, 253.

precedents clearly indicates, both Houses of Congress have considered the limits of their power to investigate to be the limits of their legislative power. In other words, their experience shows that effective legislative performance is impossible without such power.

Another important constitutional question relating to the exercise of compulsory power of investigation by Congress developed from the effects of its use on the personal rights of citizens. The question concretely stated was, just how far could Congress go in the exercise of this power without invading the personal guarantee clauses of the first ten amendments to the Constitution. We have noted in our study that both Houses of Congress have made a practice of issuing general warrants without substantiating the facts on which the warrants were issued by oath,[1] contumacious witnesses tried for contempt have been denied the right of counsel, witnesses testifying before Congressional committees have been denied the same right, papers and testimony of the most personal character have been required by these committees and the Houses of Congress have steadfastly refused to limit these proceedings by rules applicable in courts of law.

It was generally admitted in Congress that the exercise of the inquisitorial power constituted an infringement on the personal rights of citizens. For example, it was stated in the House in protest against an investigation by a select committee: "This power (of making compulsory investigations) is a high trust, a great power. It is confided to this House and it acts, when exercised, and can only act upon the personal liberty and private confidences of the citizens." [2]

It was also the common opinion in both Houses of Congress that these proceedings were at least quasi-judicial in character. If so, the argument ran, were not both Houses

[1] *Supra*, ch. iii, p. 227, note 2.

[2] *Supra*, ch. iii, p. 100.

bound to follow the principles of a court of law in carrying on such proceedings or were they to be allowed to maintain such proceedings, governed solely by their own judgment and discretion? That question has been raised in most of the various Congressional committees of investigation, as well as in both Houses of Congress, since the organization of the Federal Government, though the decisions have been uniform by such committees and by both Houses of Congress that they were not bound to follow the principles of courts of law in conducting their investigations or punishing for contempt.

Those who maintained that the rules of a court of law should apply, claimed that the use of this power without such rules would constitute an unwarranted and unconstitutional invasion of the rights of persons, for the Fourth Amendment to the Federal Constitution forbade " unlimited searches and seizures in judicial cases," the Fifth Amendment protected witnesses from the compulsory giving of self criminating testimony, while the Sixth Amendment assured the witnesses the right of counsel, compulsory process for obtaining witnesses in their behalf and the right of trial by jury.

The general answer given in Congress to these arguments was that this power must be summary and discretionary, from its very nature to be applied to the circumstances, and the offenses to which this power is to be applied do not come within that class of crimes contemplated by the Constitution, and for which is guaranteed the right of trial by jury. These cases are at least ones of conflicting rights.[1] In a famous case in the House, the common argument answering the opposition to the exercise of this power on these grounds was stated as follows: "The power of this House as to calling for and compelling the giving of testimony, whether oral or written, is much greater than that of the

[1] *Supra*, ch. ii, pp. 40, 80.

courts, the additional power is justified and predicated upon the grounds of public policy." [1]

The rights of Congress to demand papers as contrasted with those of a legal tribunal were usually stated as follows:

In a contest between parties litigant before a court of justice, the private papers of either party are not subject to production unless the party calling for them makes out such a preliminary state of facts, as in the opinion of the judge, authorizes their production, because of their pertinency and relevancy to the subject matter in litigation between the parties. That is not the rule in an investigation before the committee of a parliamentary body. Such a committee has a broader, less restricted power, that it is indeed with respect to public matters, inquisitorial in its nature. To maintain that such a committee, engaged in an important public investigation, should be limited by the rule which applies in a court of equity or of law, between parties litigant with reference to private rights, would so hamper the power of investigation which this House possesses with reference to matters of public concernment as to render it almost nugatory.[2]

A similar attitude is seen in the following: "Provisions relating to searches in the Amendment of the Constitution have no reference to the production of books and papers by witnesses before Congress. This provision is a restraint upon the courts. It has no application to Congress in exercising the power to examine witnesses or to require the production of papers, though of course its spirit and purpose should be generally regarded as a rule of parliamentary law applicable to the House. But the law is to be administered by the House and not under the direction of the judicial courts." [3]

Naturally this question of the power of Congress to de-

[1] *Supra*, ch. iii, p. 215.

[2] See *supra*, ch. iv, p. 233.

[3] See *supra*, ch. iii, p. 222.

mand papers and documents involved the problem of the proper form of the subpoena *duces tecum.* Here again we find it current practice for both Houses to issue "drag net subpoenas," refusing to lay down a procrustean rule as to the terms to be employed in framing a subpoena *duces tecum.*[1]

When complaints were made in the House of Representatives or the Senate to the general terms of such subpoenas the answer was, "The papers are required to be stated or specified with only that degree of certainty which is practicable." [2]

The fact of the matter is that both Houses of Congress have made through their investigating committees, unlimited demands on persons for papers, books and documents, the only limitation placed on such committees being that the demands be somewhat relevant to the subject matter of the investigation [3] also that the spirit, and purpose of the Fourth Amendment should be generally regarded in making these demands. But the subject matter of these investigations was often very indefinite, hence it would be only natural for the demands of a committee to be vague. Moreover the rule of relevancy in controlling demands for papers and documents in investigative proceedings is difficult of application as the very nature of such investigation is to get all the material possible, for committees certainly do not know just what papers, in the possession of witnesses, may contain valuable information for their purposes.

Recapitulating, then, with reference to the power of Con-

[1] See *supra*, ch. iv, p. 238.

[2] See *infra*, ch. iv, p. 240.

[3] Senator Walsh claims that: "the Senate committees determine the relevancy of evidence just as a court does. The question is, is the inquiry propounded, calculated to elicit information of value in the investigation being conducted." Letter to writer, November 14, 1927.

gress to force papers from witnesses we may say that Congressional committees have assumed wide latitude in making such demands on persons, that while in practically every case where unlimited demands were made, they were strenuously opposed in Congress,[1] yet the prevailing opinion in Congress has been that the Amendments to the Constitution did not protect parties in such cases anyway, with the possible exception of the Fifth Amendment; that these proceedings were inquiries, not cases or trials at law, and that even though the rights of individuals were violated, such action was necessary in the interest of public welfare.

The provision of the Fifth Amendment which reads that no person "shall be compelled in any criminal case to be a witness against himself" was usually held applicable by Congress to its investigations. As early as 1857 Mr. Orr said in Simonton's case: "Suppose a witness refuses to answer a question, because it will criminate himself. That would be in the opinion of the committee, a sufficient reason why the witness should not be called upon to answer the question."[2] On the other hand it was frequently claimed in Congress that this amendment had no more application to its investigations than the others guaranteeing personal rights because these investigations were not criminal cases.[3] The problem of securing adequate testimony and yet not violating this amendment was solved by Congress by its enactment of Section II, Act of January 24, 1857 ch. 19, 11 Stat. 155 and amendment of 1862 and revision of 1873 (U. S. Rev. Stat., sec. 102) which requires witnesses in Congressional investigations to give criminating testimony but for-

[1] See *infra*, ch. iii, p. 226, note 6.

[2] See debates on statutes, *infra*, ch. v, p. 307.

[3] See report of House Investigating Committee in case of George Seward, *supra*, ch. iv, p. 251 and compare with report of House Judiciary Committee in same case, *ibid.*, pp. 252, 253.

bids the use of such testimony against them in subsequent prosecutions.[1] The constitutionality of this statute is open to the gravest doubt on the grounds that it does not provide the immunity granted to a witness by the 5th Amendment. Recently when Fall was called before the Senate Committee on Public Lands and refused to testify on constitutional grounds, it was deemed unwise to resort to the compulsory powers of the Senate.

The prevailing opinion in Congress has always held that the Sixth Amendment did not apply to its proceedings in investigations or trials for contempt. While it is easy to show that these proceedings have frequently been irregular, inquisitorial and opposed to the letter and even spirit of the Constitution,[2] it is also true that both Houses have applied a modicum of common sense in ordering and prescribing the rules for these investigations.[3]

No committee of Congress has ever had the power of sending for persons or papers without the specific grant of such power by the House concerned. Even in cases wherein the rules give to certain committees the authority to investigate without securing special permission, authority must be obtained before the production of testimony can be compelled.[4] Then, too, committees of Congress are agencies of limited purpose, that is, they can not investigate matters outside the scope of the order which established them. For

[1] See discussion *infra*, ch. v, pp. 336-339 and ch. vi, pp. 389-390.

[2] See *supra*, p. 226.

[3] See *House Manual, House Doc. no. 661*, 68th Cong., 2d sess., pp. 127-131; *Senate Manual, Senate Doc. no. 182*, 68th Cong., 2d sess., pp. 115-117.

[4] *House Manual*, p. 127. Note: "Standing committees such as the Committee on Expenditures may make investigations without specific direction from the House, but authority must be obtained of the House for compelling testimony."

example the House Ways and Means Committee could not investigate immigration.

While up to 1873 it was common practice for Congressional investigating committees to take testimony in secret and conduct their proceedings behind closed doors then to report the testimony to the House to be made as public as it desired, now the doors are usually thrown open and the hearings are public.[1]

It is wholly within the committees' jurisdiction whether hearings for the purpose of taking testimony shall be secret or public. Jefferson's Manual of Parliamentary Practice, which still has force in so far as it is applicable and not inconsistent with the House rules and orders, says in this respect: "Their proceedings are not to be published, as they are of no force till confirmed by the House." To this source in the absence of any specific rule of the Houses of Congress is due the secrecy which sometimes conceals the proceedings of Congressional investigating committees.

Whether the House concerned in the inquiry will publish the hearings or not depends usually upon the importance of the inquiry.

No committee of Congress has ever had the power of punishing for a contempt; such as refusal to obey its demands for papers or testimony. Rather it has been the invariable rule that such contempt was a contempt of the House which appointed the committee and therefore the committee should report the contempt to it for action. Witnesses held guilty of contempt were generally given a hearing before the House concerned as to why they had refused to testify. In these hearings or "trials" for contempt, witnesses were usually allowed counsel and the aid of compulsory process in their behalf to summon witnesses.

Witnesses summoned in Congressional investigations were

[1] See *supra*, ch. iii, p. 199.

always paid by the House conducting the investigation, although either House of Congress can demand the attendance of witnesses "to be paid or not" according to its own will or pleasure. Usually witnesses are paid as provided in the manuals, except those holding official positions or who appear voluntarily.[1]

Neither House may command the attendance of a member of the other, although such attendance may be requested.[2]

Even after the statute of 1857 was enacted, which provided for the certification of the facts of the contumacy of a witness by the Speaker of the House or the presiding officer of the Senate, such certification as a rule never took place without the witness first having a hearing before the House concerned. For example the Speaker of the House has ruled

> that a contumacious witness is first to have an opportunity to answer to the House of Representatives why he refuses to testify. That is, he cannot be held to answer until the committee shall present to him the question and ascertain why he refused to answer it and only after such procedure may the facts of the witness's contumacy be certified to the District Attorney of the District of Columbia under the Revised Statutes.[3]

However, this rule has not held in recent years. Procedure in this respect has varied and both Houses have been in doubt as to what was the best practice. The uncertainty of the Houses of Congress as to the proper procedure for dealing with contumacious witnesses has included the question

[1] Lilley *v.* U. S., 14 Court of Claims 539 (*infra*, pp. 356-358) also see Watson on *Constitution*, vol. i, p. 286. For present provisions pertaining to payment of witnesses, see *infra*, Appendix B, pp. 434, 435.

[2] See *House Manual*, p. 129. For list of precedents dealing with members of Congress as witnesses, see, 52d Cong., 2d sess., *Senate Misc. Docs.*, ser. no. 3070, pp. 79-82.

[3] See *supra*, ch. iii, pp. 175, 176.

whether such witnesses should be punished by imprisonment in the common jail to the end of the session of the House concerned or should they be turned over to the courts immediately, to be punished according to the Statutes, or, finally, should they be punished both by the House concerned and according to the statutes.

The practice of recent Congressional investigating committees has been to report the facts of the contumacy of a witness to the House concerned with a recommendation that the witness be punished as the statutes provided.

The uncertainty surrounding this question is seen in the procedure in the case of Sinclair's refusal to testify to the Senate Committee on Public Lands and Surveys.[1] In making the report for the Committee Senator Walsh stated:[2]

Mr. President, in view of the contumacy of the witness shown by the report just submitted, there are two courses open to the Senate, either to bring the witness before the bar of the Senate, and persisting in his contumacy, to commit him to the custody of the Sergeant-at-Arms for imprisonment until he shall consent to answer, or to report the matter as contemplated by the Statute of 1873 for appropriate action by the District Attorney of the District of Columbia and a grand jury.

Senator Norris: I want to ask the Senator whether in his judgment both courses could not be pursued. The Senator said we could take one of two courses. What is to hinder and what is the objection to both courses being pursued? In other words, if a witness who refuses to answer was brought to the bar of the Senate and confined by order of the Senate in jail until he answered, would that be any reason why he should not be punished in regular court proceedings according to the Statute which the Senator has read?

Mr. Walsh: I am not sure that either of the remedies is exclusive of the other as a matter of law, but as a matter of practice

[1] 68th Cong., 1st sess., *Record*, March 22, 1924, pp. 4725, 4790.

[2] *Ibid.*

they become practically so I think. The situation would be this: If the witness were brought before the bar of the Senate and an order, after his commitment, were made to the effect that he should stand committed until he should answer, he would of course, then sue out a writ of habeas corpus and he would be held under that writ. If the court should decide against him that his objection is not well taken, he would be remanded to the custody of the Sergeant-at-Arms. He would then sue out a writ of error and he would be entitled to bail under that writ of error.

At any rate Senator Walsh reminded the Senate that there was no doubt of the contumacy of the witness and that the Senate would gain nothing by giving him a hearing, therefore the facts of his contumacy should be immediately certified to the District Attorney. The question then arose as to whether any action of the Senate was necessary on this report. Some believed that with the report of the committee, it became automatically the duty of the presiding officer of the Senate to certify the facts. However the Senate passed a motion adopting the report of the Committee on Sinclair's contumacy and recommended that the facts of his contempt be reported according to the law.

The same uncertainty with respect to procedure is seen in the refusal of Samuel Insull to give certain testimony to the Senate committee investigating the last senatorial election in Illinois. The committee was uncertain whether they should report Insull's contempt to the Senate and call for a resolution from that body providing for a warrant for his arrest and subsequent appearance before the bar of the Senate or rather recommend that the facts of his contumacy be certified to the District Attorney as provided under the Statutes.[1]

The fact is that in recent years both Houses of Congress have hesitated to use their implied power to arrest witnesses,

[1] *New York Times*, February 13, 1927.

bring them before their respective bars for trial and punish them directly for contempt. Such proceedings may be quickly interrupted by the courts as Senator Walsh indicated, and hence it is much easier to report the contumacy of witnesses to the courts for punishment as provided in the Statutes.

The power of the courts to issue writs of habeas corpus or writs of error has nullified to a certain extent the effectiveness of the common law power of Congress to punish for contempt. An example of this may be noted in the case of Mal S. Daugherty, who refused to give a Senate committee certain testimony. A resolution was enacted by the Senate requesting its president to issue a warrant for his arrest and to cause him to be brought before its bar. However as soon as the Sergeant-at-Arms arrested him, he was able to get a writ of habeas corpus issued by a court, thus taking his case entirely out of the hands of the Senate for the time being, while the court passed on the proceedings. In the meantime Daugherty was free on bail, and the Senate investigation was held up.

If on the other hand, the Senate had been able to bring him before its bar, and in case of continued refusal to answer the demands of its committee, put him in the common jail as was formerly the practice, probably he would have seen fit to answer.

Another check on the common law power of Congress to punish for contempt is that if a contumacious witness is imprisoned and he later secures his freedom through issue of writ of habeas corpus and decision of the court that the House had no right to conduct the investigation, the witness may in turn sue the Sergeant-at-Arms for false imprisonment and recover damages. In other words, the Speaker's warrant is no protection in case of false imprisonment.[1]

[1] See case of Kilborn, *supra*, ch. vi, p. 350.

The foregoing discussion certainly proves that witnesses guilty of contempt of Congress are fairly certain of a jury trial and punishment according to the statutes and that the common law power of Congress to punish for contempt is restricted by the power of the courts to review such proceedings. The decision in Kilbourn v. Thompson sanctioning the judicial review of Congressional proceedings in contempt cases has practically forced Congress to relinquish punishment in such cases to the courts. This is a good thing in one way as there is little likelihood of either House of Congress becoming engaged in a protracted trial of contumacious witnesses, thus wasting much valuable legislative time (a practice frequently indulged in by both Houses in the past).[1] It also eliminates the criticism so often heard that contumacious witnesses in these "trials" for contempt were not given the consideration due an American citizen under the law.

On the other hand, if the Houses of Congress could summarily imprison contumacious witnesses in jail until the end of the session, these investigations would be much more effective and such contumacy as that of Sinclair, Insull and Daugherty would probably be avoided, at least they would fear much more the power of the Houses of Congress to punish for contempt.

Of course the recent decision of McGrain v. Daugherty[2] which approved the power of Congress to punish for contempt in "legislative" investigations, will mean that con-

[1] "I am entirely in favor of referring these questions to the courts of justice, for the reason that we have other and more important business here than trying an offender and the fittest disposition of one is to refer him to the courts of justice under an existing law, while the two Houses may be attending to their legislative duties." Argument given in the Senate by Toucey in Simonton's case, in advocating the passage of the Statute of 1857. See 53rd Cong., 2d sess., *Senate Misc. Doc. no. 12*, 1893-94, p. 175.

[2] 273 U. S. 135.

tumacious witnesses will have less opportunity than formerly to escape from the punishment which may be meted out to them as an exercise of the implied power of Congress to punish for contempt.[1] The effect of this decision can already be seen in the consent of both Mal S. Daugherty and Samuel Insull to appear before Senate committees and answer the questions which they had formerly refused to answer.

It is evident from our review of Congressional precedent that the Houses of Congress have several options in dealing with cases of refusals of witnesses to testify: (1) no action may be taken against the witness, which of course leaves him under a cloud of suspicion; (2) the witness may be imprisoned by the House concerned until he does testify or until the end of the session; (3) the facts of the witness's contumacy may be reported to the courts for indictment as provided for in the statutes; (4) the House concerned may imprison the witness and at the same time recommend his punishment according to the statutes.

This places a witness who refuses to answer questions of a Congressional investigating committee on the ground that they are irrelevant, in a serious predicament. He does not know to what form of punishment he may be subjected. In fact he may not be punished at all. If the House concerned imprisons him under its common law power to commit for contempt, and a court, subsequently, in habeas corpus proceedings, decides the witness must answer, he can go before the committee, answer the questions and secure his freedom. However, if the House concerned should happen to certify his refusal to answer questions to the courts for indictment and punishment as provided in the statutes, and the courts subsequently decide the questions were relevant,

[1] See reform suggested by Senator Allen, *supra*, ch. iv, p. 267.

he cannot secure his freedom by agreeing to answer the questions.[1]

Our study of the practice in investigative proceedings and of the rules pertaining thereto indicates that while they have been to a large extent untrammeled by legal rules and prescriptions, yet on the whole, Congress has not given evidence of going to extremes or abusing its power to investigate. On the other hand there is sufficient evidence to indicate that if these investigative proceedings were hampered by intricate rules and legal formality, their effectiveness would be materially lessened.[2]

The fact is that it is not to rules and legal restrictions that we should look for restraints on this power. The representative character of our government should exert enough restraint to keep the exercise of inquisitorial power by the Houses of Congress within proper bounds. As our study of the proceedings of Congress shows, this power is a dangerous one, which may be abused at times because of the lack of formal restriction. This has been recognized in Congress, practically every time its exercise was suggested, yet undue fear in this direction has been assuaged by statements such as the following one of Mr. Ellsworth, made in the House of Representatives in 1832:

[1] See discussion, *infra*, ch. v, pp. 316-318, ch. vi, pp. 386, 387 also article by McBain, Howard Lee, "Congress Inquiries and the Constitution" in *New York Times*, March 11, 1928.

[2] Felix Frankfurter in the *New Republic*, May 21, 1924, says, "The procedure of Congressional investigation should remain as it is. No limitations should be imposed by Congressional legislation or standing rules. The power of investigation should be left untrammeled and the methods and forms of each investigation should be left for the determination of Congress and its committees, as each situation arises. The safeguards against abuse and folly are to be looked for in the forces of responsibility which are operating from within Congress and are generated from without."

I freely concede that this is a power of dangerous character; and what then? All power is dangerous; but whatever it is, we lay it down once in two years, and give an account of its exercise. All power is liable to abuse, and if gentlemen will allow none to be possessed but what may be abused, how much do they leave us? The idea is utopian that government can exist without leaving the exercise of discretion, in some degree, somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their will, individual fears may be enhanced by the monsters of imagination, but individual liberty can be in little danger.[1]

[1] See *supra*, ch. iii, p. 114.

CHAPTER V

Statutory Evolution of the Inquisitorial Power of Congress

It was decided very early by both Houses of Congress, that the power to compel information ought not to be used without the solemnity of an oath to the fact. In Randall's case,[1] the Chairman of the Committee on Privileges, reporting on the subject of further proceedings, recommended that the Judge of the Federal District Court of Pennsylvania be requested to attend, "to administer an oath or affirmation to the witnesses on the part of the prisoner." This led to an extensive debate on the question whether it was necessary for witnesses to testify under oath, especially if they were members of Congress and had already taken oath to support the Constitution. Mr. Madison said that he was of the opinion that no citizen could be punished without the solemnity of an oath to the fact. "Of consequence it is needful to the information of members, if the punishment of a fellow citizen is implicated." [2] The House finally in this case adopted a resolution requesting the Judge of the District of Pennsylvania to attend, "for the purpose of administering an oath or affirmation to all witnesses." [3]

The same procedure was adopted in the impeachment proceedings against William Blount. When his case came up in the House, it was suggested that the Speaker should pro-

[1] *Annals*, 4th Cong., 1st sess., Dec. 31, 1795, pp. 185-195 (discussed *supra*, ch. ii, pp. 40, 41.

[2] *Ibid.*, p. 186.

[3] *Ibid.*, p. 195.

ceed to take evidence as to the handwriting of William Blount. He believed, however, that it was proper to call in a magistrate, as he had no power to administer oaths, except in the case of qualifying the members of the House. When it was moved that the Speaker be authorized to administer oaths on this occasion, it was defeated 53 to 29. Judge Keene in the meantime, coming to the House, a motion was made and carried, "that he be requested to administer an oath to Messrs. Macon, McDowell, Grove, and Baldwin, which was accordingly done." [1]

The Senate followed this procedure in the same case by agreeing to a motion that "Mr. Justice Smith attend and administer the oath to such witnesses as might be adduced before the committee." [2]

On February 26, 1798, Mr. Kittera of Pennsylvania said, as some inconvenience had been lately experienced in the examination of witnesses before the House and its committees, he would propose a resolution, in order to remove this inconvenience in the future. It was to the following effect: Resolved,

> That a committee be appointed to inquire into the propriety of authorizing the President of the Senate, the Speaker of the House of Representatives, or the Chairman of a Committee of the Whole, or the Chairman of a committee of either House to administer an oath or affirmation in any case under investigation in which an oath or affirmation may be necessary, and that they report by bill or otherwise.[3]

The resolution was adopted and a committee of three appointed. The committee reported a bill favorable to the resolution and on April 9, 1798 the House passed the bill

[1] *Annals*, 4th Cong., 1st sess., p. 458, July 6, 1797.

[2] *Annals*, 5th Cong., 1st sess., July 8, 1797, p. 41.

[3] *Annals*, 5th Cong., 2d sess., p. 1069.

and transmitted it to the Senate. An act[1] was eventually approved by both Houses as follows:

Sec. 1, Be it enacted by the Senate and the House of Representatives in Congress assembled, That the President of the Senate, the Speaker of the House of Representatives, a chairman of the Committee of the Whole or a chairman of a select committee of either House shall be empowered to administer oaths or affirmations to witnesses in any case under their examination.

Sec. 2, And be it further enacted, That if any person shall willfully, absolutely and falsely swear or affirm, touching any matter or thing material to the point in question, whereto he or she shall be thus examined, every person so offending and being thereof duly convicted, shall be subjected to the pains and penalties, which by law are prescribed for the punishment of the crime of willful and corrupt perjury.[2]

In 1817, the above statute was amended to include the Chairman of any standing committee of the House or Senate.[3]

Under the authority of this statute, certain officers of Congress and of committees of Congress, could administer oaths, and it was no longer necessary for the House or the Senate to call in judges of the Federal courts to administer oaths to witnesses. While witnesses were usually sworn, cases have been observed in this study, where the oath was omitted.[4]

It will be recalled that in the proceedings of Congress in contempt cases, numerous and bitter objections were made to the exercise by Congress of the power of punishing for contempts, because as a matter of fact, Congress had never defined by law what acts constituted contempts, so that the

[1] May 3, 1798.

[2] 1 *U. S. Stat. at Large*, 554; *U. S. Rev. Stat.* 1873-4, sec. 101.

[3] 3 *U. S. Stat. at Large*, 345.

[4] See *supra*, ch. iii, 244.

citizen might know when he was committing a crime or act punishable by Congress or the courts. The statement of Thomas Jefferson on the Aurora case explains the situation very well.[1]

As has been shown, there was always great doubt in Congress as to the power of either House to punish contumacious witnesses and compel testimony, especially where such proceedings had to do with investigations for the purpose of acquiring information to aid in the making of legislation.[2] When this power was used in connection with the privileges of Congress, enumerated in the Constitution[3] it was not considered so arbitrary.

However, admitting that Congress had the constitutional and common law right to punish for contempts, the question was often asked when this power was used, what constitutes a contempt and what is the extent of Congress' power to punish for the same? Many Congressmen felt the way Jefferson did, as stated in his comment on the Aurora case. They held that to keep this great power undisclosed and undefined was a wholesale denial of the Fifth and Sixth Amendments to the Federal Constitution guaranteeing individual liberty.

For example, Mr. Spencer of New York on January 9, 1818, submitted the following preamble and resolution to the House:

> The House of Representatives entertaining great doubts of its power to punish John Anderson for his contempt of the House, and his outrage upon one of its members,
>
> Resolved, That all further proceedings in this House against the said John Anderson do cease, and that he be discharged from the custody of the Sergeant-at-Arms.

[1] See *supra*, ch. ii, pp. 51-53 or Jefferson's *Manual*, Senate ed. 1892, p. 194.

[2] See for example, *supra*, ch. ii, pp. 94-97 and *ibid.*, ch. iii, pp. 161-167.

[3] See *supra*, ch. iii, p. 163.

Resolved, That the Attorney General of the United States be directed to institute such proceedings against the said John Anderson for his said offense, as may be agreeable to the laws of the United States and the District of Columbia.

Resolved, That the Committee on the Judiciary be instructed to inquire into the expediency of providing by law for the punishment of any contempt of the Senate or House of Representatives of the United States and of any breach of the privileges of either House.[1]

The subsequent history of this case shows that a majority of the members of the House entertained no such doubts and we find both Houses of Congress following the English precedent of strongly asserting its "incidental" power to punish for contempts in cases of breaches of privileges or of contumacious witnesses while refusing to define the limits of this power by statute.[2]

Whether an act of a witness, for instance, constituted a contempt, Congress decided in each individual case, although precedent was followed rather closely. It was seldom indeed that either House decided against the use of this power. It might be said that many of the decisions of Congress as to contempt were influenced more by passion or political partisanship than by cool judgment.[3]

Moreover, when Congress finally did enact a statute defining certain contempts[4] its action was not based on the desire to hang up a law for the inspection of all and thus define its authority in these cases, but simply to add further punishment and penalties to those already existing and make its power more effective. For, at the time the Act of 1857 was passed the House was defied by a contumacious witness

[1] 15th Cong., 1st sess., *Journal of the House*, p. 129.

[2] See discussion *supra*, ch. ii, pp. 74-82.

[3] See case of Patrick Woods, *supra*, ch. iii, pp. 180-184.

[4] Act of January 24, 1857, ch. xix, *11 Stat. 155*.

and the debates show that passion dictated the enactment of this legislation, which was rushed through Congress so fast that many of its opponents claimed that it was passed for the sole purpose of punishing the contumacious witness then before the House and would be *ex post facto* legislation. This most important statute enlarging the powers of either House of Congress to coerce testimony and punish for contempt grew out of the obstinacy of J. W. Simonton, a newspaper correspondent of the *New York Times,* who, on being examined before a select committee of the House appointed to investigate certain charges in the *Times* that members of Congress had entered into corrupt combinations to influence legislation, stated that members had offered to sell their votes through him, but refused to disclose the names of such members on the alleged ground that it would be a breach of honorable confidence to do so.[1]

The committee, in reporting his contumacy to the House stated that they were impressed by

> the materiality of the testimony withheld by the witness as it embraced the letter and spirit of the inquiry directed by the House and that it was necessary that the witness give this testimony in order that the House could purge itself of unworthy members, in case it were true.

The committee deemed it unnecessary to enter into elaborate argument to establish the power of the House in this case, for they pointed out that, "the summons issued under the hand of the Speaker and was tested by the Clerk of the House, and the contumacy of the witness is a contempt of that authority." The committee further mentioned the act passed May 3, 1798 giving authority to swear witnesses and punish false swearing as perjury and asked, "is it then, no contempt of the authority of this House (and the committee

[1] See *supra,* ch. iii, pp. 150-154.

acting are acting as and for the House in this investigation) for a witness to refuse to testify to material facts within his knowledge?" The committee concurred unanimously in the opinion "that the House is clothed with ample power to order the party into custody there to remain until released by the same authority, or upon the expiration of the present Congress" and recommended the adoption of a resolution directing the Speaker to issue his warrant "directed to the Sergeant-at-Arms, commanding him to take into custody the body of the said James W. Simonton, wherever to be found, and the same forthwith to have before the said House, at the bar thereof, to answer as for a contempt of the authority of this House."[1] As part of this report, Mr. Orr, chairman of the committee, said he would also like to submit a bill, "more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony. The resolution calling for the arrest of Simonton was passed by the House by a vote of 164 to 16. The question then recurred on the bill reported by the committee.

The bill as originally reported contained two sections as follows:

Section I. That any person who may be summoned as a witness by the authority of either House of Congress to give testimony, or to produce papers upon any matter before either House, or before any standing committee of either House, and who shall willingly make default, or who appearing, shall refuse to discover all the facts and circumstances within his knowledge when demanded, shall be, in addition to the pains and penalties now existing, liable to indictment as for a misdemeanor in any court of the United States having jurisdiction thereof, and, shall on conviction, be punished by a fine not exceeding one thousand dollars and not less than one hundred dollars, and by imprison-

[1] 34th Cong., 3d sess., *Globe*, pp. 403, 404, January 21, 1857.

ment in the penitentiary for not less than one month and not more the twelve months.

Section II. That no person examined, or testifying before either House of Congress or before a committee of either House of Congress, shall be held to answer criminally in any court of justice of the United States, or shall be subject to any penalty or forfeiture for any act or fact touching which he shall be required to testify before either House or committee, and as to which he shall have testified whether before or after this act; and that no statement made or paper produced, by any witness before either House of Congress, or the committee of either House, shall be competent testimony in any criminal proceeding against such a witness in any court of justice; and that no witness shall hereafter be allowed to refuse to testify to any fact or to produce any paper touching which he may be examined, for the reason that his testimony, or the production of such papers, might tend to disgrace him or otherwise render him infamous.[1]

A sharp debate followed the introduction of this bill in the House. In support of the bill Mr. Orr said:

The committee may not be able to proceed in their investigation so as to report the facts to the House, unless such a bill is passed to give us authority to bring witnesses before us, and to inflict a greater punishment than the committee believe the House possesses the power to inflict. Some gentlemen say that the very fact of presenting this bill is an admission that the House has no power upon this subject, and that it negatives the resolution which we have already adopted, that is, to take Simonton into custody and bring him before the House to answer for his contempt. No such thing. The power of this House I believe it is conceded by all, in reference to the punishment which it can impose for a breach of its privileges or contempt terminates with the adjournment of Congress. It terminates upon the 4th of March; and the committee are satisfied

[1] 34th Cong., 3d sess., *Globe*, p. 404.

that if the House exercise all the power which the majority on this floor claim that it can exercise, that it will be insufficient to extort testimony from unwilling witnesses. That is the position in which we are placed and that is the reason for the necessity for this special report from the select committee.[1]

Mr. Orr definitely stated that the object of the bill was to give "additional authority, and to impose additional penalties on a witness who fails to appear before an investigating committee of either House or who, appearing, fails to answer any question." With reference to the need for the first section he said:

Suppose a witness fails to attend, what is the remedy? We pass a resolution such as we passed this morning . . . and bring a contumacious witness to the bar of the House. He makes his statement, if you choose. The House considers the excuse which he tenders for his contumacy is insufficient and the House orders him into the custody of the Sergeant-at-Arms. Until when? Your power to punish for any contempt committed against the authority of the body of which you are members expires unquestionably when the commission of the members constituting that body expires. Of that there can be no doubt. A question might be raised on that point in the Senate of the United States, where a majority of the Senators hold over four years from the particular time when a matter of this sort should transpire. But in this House where the commissions expire, there is no doubt on that question. I believe that no one has ever held that the House has authority to go beyond the limitation of the term for which the members are elected in punishing witnesses for contempt of the authority of the House. Is that punishment adequate? What would be the term of imprisonment? Take the case we have before the House, and the imprisonment under its order could not be for more than five weeks.[2]

[1] 34th Cong., 3d sess., *Globe*, p. 405.

[2] *Ibid.*, p. 406.

In further emphasis of the need for the first section of the bill, Mr. Orr stated another possibility:

Suppose that two days before the adjournment of this Congress there is a gross attempt on the privileges of this House by corrupt means of any description; then the power of this House extends only to those two days. Is that an adequate punishment? Ought we not then, to pass a law which will make the authority of the House respected; and in addition to that, after this bill has passed, this House will turn these matters over to the courts—tribunals which have the time, education and facilities for investigating such charges? This House cannot undertake to constitute itself a court to determine all these things, because it would consume too much time. An entire session might be exhausted by them if there were a series of contempts.[1]

As to the second section of the bill Mr. Orr said:

When a witness is brought to a particular point, to material facts within his knowledge, with reference to combinations which we are charged to examine into, he folds his arms and says to the committee " I decline to answer that question because it will criminate myself." Well, sir, that would, in the opinion of the committee, be a sufficient reason why the witness should not be called upon to answer the question.

But Orr pointed out that these facts were material and essential, and the committee should have the power to secure such testimony. " If this section becomes law it would require the party to answer, but with the provision that the person so testifying in that particular should not be liable to the pains and penalties of this act in consequence of his having given that testimony." [2]

In other words, it was maintained that this section was in

[1] 34th Cong., 3d sess., *Globe*, p. 406.

[2] *Ibid.*, p. 405.

effect a parliamentary pardon for every criminal act of which a witness, testifying before either House of Congress, or a committee, may disclose himself to have been guilty. It was further maintained that this had always been the rule with reference to parliamentary investigations.

Cushing was referred to as an authority sanctioning such a principle and was cited in the debate as follows:

It has already been seen that a witness before either House of Parliament can not excuse himself from answering any question that may be put him, on the ground that the answer would subject him to an action, or expose him to a criminal proceeding, or be the means of divulging the secrets of his client communicated to him in professional confidence, or be in breach of judicial oath as a grand juror, or of a voluntary oath as a free man, or the like; some of which would be sufficient grounds of excuse in a court of justice. This difference between proceedings in Parliament and in ordinary courts has been established upon the grounds of public policy, and is considered to be fundamentally essential to the efficiency of a parliamentary inquiry. But while the law of Parliament thus demands the disclosure of the evidence, it recognizes to the fullest extent the principle upon which the witness is excused from making such disclosures in the ordinary courts of justice, and protects him against the consequences which might otherwise result from his testimony; the rule of Parliament being that no evidence given in either House can be used against the witness in any place without the permission of the House, which is never granted, providing the witness testifies truly.[1]

Two amendments were immediately offered to the bill, one by Mr. Cobb to the effect that

in case any witness shall refuse to testify or produce papers when summoned as hereinbefore provided, before the House or the Senate, or any committee of either House, such person so

[1] 34th Cong., 3d sess., *Globe*, p. 428.

offending may, by order of the House whose authority he resists be imprisoned in the jail of this District for any time not exceeding six months.

He said he thought this amendment was necessary because a minority of the House do not believe that power to imprison witnesses refusing to testify or produce papers before one of our committees exists without the passage of a law or rule upon that subject, that while the majority hold a different opinion, they ought, in deference to the views of the minority, to place this matter beyond doubt. This amendment Mr. Cobb introduced as an additional section to the bill.[1]

Mr. Ritchie moved the following amendment as a proviso to the second section: "Provided, that nothing in this act contained shall exempt a witness from prosecution and punishment for perjury committed by him in giving his testimony when required as aforesaid, or for forgery committed by him of any matter he may produce." [2]

Strenuous opposition developed to the bill in the ensuing debate. Those opposing the bill claimed it was a denial of the constitutional rights of the citizen in that it was contrary to the Fourth and Fifth Amendment to the Constitution, for it sanctioned unreasonable searches and seizures, compelled a person to be twice put in jeopardy for the same offense and compelled a man to criminate himself. It was claimed that the second section was especially dangerous as a person might for example,

offer his bribe to a Congressman to affect his vote. The law says that a man can be indicted, and if convicted, confined to the penitentiary for three years. Suppose he finds that his conduct may be exposed to publicity. He invokes a friendly hand

[1] 34th Cong., 3d sess., *Globe*, p. 405.

[2] *Ibid.*, p. 404.

and gets an article published in a newspaper. Congressional integrity is alarmed, the honor of the House feels itself sullied, a committee is appointed, this fellow is summoned as a witness, and by the second section of this bill, having testified to the fact, he slips all responsibility under your general law, and commutes his punishment for your pardon. He is told you are not to be punished for the acts to which you have testified, and for which you might have been punished under the existing laws. You are relieved from the tender mercies of a jury. We repeal the statute laws of the United States for your benefit and remit in your behalf the penalty now inflicted upon criminals of your class and degree.[1]

This latter argument was answered by Mr. Orr, who said it was more important that the House should purge itself than that an individual should be convicted before a criminal court.[2]

To the protest that this was a proposal to change the great rule of common law—the rule that "no man is bound to incriminate himself on any charge or in any court"[3] the answer was that it was common to change common law by the enactment of statutes.

Others protested that this was too hasty legislation, that the bill should be referred to the Committee on the Judiciary for further consideration. In making this suggestion, Mr. H. Marshall said, "I have no idea of the Committee on the Judiciary being overslaughed in this style."[4] However Mr. Orr said that time was passing, that "the bill should be passed now by the Congress of the United States in order that it might ferret out and expose all the corruptions that have been charged on members of this House."

[1] 34th Cong., 3d sess., *Globe*, p. 431.

[2] *Ibid.*, p. 432.

[3] See Wigmore, *op. cit.*, vol. iv, sec. 2250.

[4] 34th Cong., 3d sess., *Globe*, p. 406.

If the House intends to say to recusant witnesses that, for continued contempt, they shall suffer more than mere imprisonment from now to the end of the session, we must pass it without reference to any committee. This bill should be passed in order to give some efficiency and vitality to this investigation which this House has instituted.[1]

Still further protest was made against the bill on the ground that it was unnecessary, that the Houses already had sufficient power to punish for contempt. Some said also that the very fact of the committee's offering this bill showed that the House had no power on the subject.

Finally after the House had called Simonton before its bar and ordered him into the custody of the Sergeant-at-Arms for his continued refusal to answer the questions of the committee, Mr. Davis for the select committee defied by Simonton offered a substitute bill for the bill originally submitted, and the two amendments by Cobb and Ritchie.

This bill read as follows:

Section I. That any person summoned as a witness by the authority of either House to give testimony, or to produce papers, upon any matter before either House of Congress, who shall willingly make default, or who appearing shall refuse to answer any question pertinent to the matter of inquiry in consideration before the House or committee by which he shall be examined, shall, in addition to the pains and penalties now existing, be liable to indictment as and for a misdemeanor in any court of the United States having jurisdiction thereof, and on conviction, shall pay a fine not exceeding one thousand dollars, and not less than one hundred dollars and suffer imprisonment in the penitentiary not less than one month nor more than twelve months.

Section II. That no person examined and testifying before either House of Congress or any committee of either House,

[1] 34th Cong., 3d sess., *Globe*, p. 432.

shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture, for any fact or act touching which he shall be required to testify before either House of Congress, or any committee of either House, as to which he shall have testified, whether before or after this act; and that no statement made or paper produced by any witness before either House of Congress, or before any committee of either House, shall be competent testimony in any criminal proceeding against such witness in any court of justice; and no witness shall hereafter be allowed to refuse to testify to any fact or to produce any paper touching which he shall be examined by either House of Congress or any committee of either House, for the reason that his testimony touching such fact or the production of such paper may tend to disgrace him, or otherwise render him infamous, Provided, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid.[1]

Mr. Davis in explaining the alterations in the original bill said that they were confined "simply to making the language more precise, in order that there might be no difficulty, if a case should arise, in knowing exactly what the courts would have to pass upon." The only alteration in the first section of the bill was to substitute for the language, "if a witness shall refuse or fail to discover the facts and circumstances" the words, "shall fail to answer any question." This change being made, Mr. Davis said,

in order that there might never arise a question as to whether the witness had held back a part of the circumstances, and only discovered a portion, and so as to confine the judicial inquiry to the fact whether he had willingly refused to answer, leaving entire freedom as to the kind of answer he shall make to the question.[2]

[1] 34th Cong., 3d sess., *Globe*, p. 427.

[2] *Ibid.*

The modification of the second section was only in the addition of the proviso moved by Mr. Ritchie, providing that nothing in the act shall exempt the party from prosecution for any perjury committed in the course of such an investigation. Mr. Cobb's amendment was neglected in this substitute bill.

Mr. Davis gave a very strong argument in support of the committee's bill, now in its slightly altered form. He stated that

> the first section of the bill confers no summary power on any tribunal, it increases no power now existing in any committee, and confers no power to be exercised either by the committee or the House. It makes a mere substitution of a judicial proceeding by attachment of a parliamentary body. It substitutes a definite and efficient punishment for an indefinite and inefficient punishment. It substitutes the quiet formality of judicial proceeding in lieu of the irregular proceedings which occurred in this House yesterday, in attempting to exercise such jurisdiction as is necessarily incident to any parliamentary investigation.

He further pointed out that this bill would thus throw the safeguard of a judicial trial around a contumacious witness, and allow him to be equitably punished according to the gravity of the offense. Moreover he showed that in addition to this security of the rights of the citizen, "it removes him from the passions and excitement of this Hall—where partisans may frequently, in political questions, carry into the measures of punishment their party hostilities."

In speaking for the second section Mr. Davis emphasized the points already established in the debate on the original bill, saying:

> The first portion of the second section is intended to grant a parliamentary pardon beforehand to every witness who, on the summons of the House or a committee, shall appear before them and testify to any fact of which he may have been guilty, otherwise there is no mode by which a pardon can be granted.

This was necessary he said "in order to remove the obstacle to the investigation of parliamentary corruption." "The purity, dignity and existence of the Republic, demand that every fear should be taken away from the mind of the witness, in order that he may honestly and freely explain and disclose everything touching himself as well as any other person."

The second clause of the second section of the substitute bill, Mr. Davis explained, was simply following out the long established practice of Parliament in similar proceedings, namely, to prevent those facts, which the party has disclosed from being given in evidence against him, which would tend to criminate him.[1]

Study of the second section of the substitute bill thus shows it performed two acts for the witness compelled to give criminating testimony, first, it granted a complete pardon for any fact or act to which he should be required to testify, that is, it repealed the criminal law in his favor, and second, it disqualified those facts which a witness has been compelled to give from being given in evidence against him in any criminal proceeding.

During the debate on the substitute bill Mr. Letcher said he

> would like to suggest the propriety of adding a third section to the bill which will make it the duty of the Speaker of the House, or of the Clerk of the House, to report to the attorney for the District of Columbia any failure that may occur under the law, in order that a prosecution may be instituted.[2]

His suggestion was approved by the House and became the third section of the act. It was not debated in either the House or the Senate and seems to have been interpreted as

[1] 34th Cong., 3d sess., *Globe*, p. 427.

[2] *Ibid.*

a mandatory provision requiring the officers named, "when a witness shall fail to testify . . . and the facts shall be reported to the House," to take cognizance as in the case of any other provision of law. Under some further urging by Orr and Davis, the House finally approved the substitute bill with the third section added, by the overwhelming vote of 183 to 12 and sent it to the Senate.[1]

The bill met sharp opposition in the Senate but it was shortlived. Senator Pugh from Ohio, perhaps the most eminent jurist of the party then controlling the Senate, in opposing the second section of the bill said:

> The provision will operate in practice as an advantage to those who are most guilty and least scrupulous, enabling them to escape the just consequences of their own crime by the betrayal of their less culpable associates. It is the system too frequently practiced of granting pardon to that one of two or more prisoners who will testify for the prosecution, a system the mischiefs of which are so enormous as to have induced the general opinion that the greatest knave is the first to become the State's evidence.[2]

Certain Senators were especially antagonistic to the second section of the bill which they said was a denial of the great common law right of every citizen. The objection was answered by the statement that

> the bill takes away the exemption afforded by the common law, that a witness need not testify where the matter on which he may give testimony will criminate himself and takes away the exemption that he may refuse to testify when the matter may render him infamous, but grants him a parliamentary pardon for such acts as he testifies to.

The question was asked, "Is it not better to trench on the

[1] 34th Cong., 3d sess., *Globe*, p. 433.

[2] *Ibid.*, p. 442.

rights of the individual man than thus to tamper with the great and sacred rights of a government? The violation of the case justifies this violent innovation upon the common law." [1] After some further debate the Senate also became thoroughly convinced of the need for the legislation and passed the bill without amendment by a vote of 46 to 3.[2]

It is obvious that this statute was passed for two main reasons, first, to increase the power of either House of Congress to punish for contempt in cases of contumacy of witnesses, and second, to compel criminating testimony. A third reason, although undoubtedly a minor one, was that the effect of the enactment of this legislation would be to remove the trial of cases of contempt of either House of Congress from their respective bars to the courts, where passion and partisanship would not influence the decision against the prisoner and where he would have a trial by jury and all the other constitutional safeguards of court proceedings. This advantage of the statute was mentioned both in the House of Representatives and the Senate.

The Congressional power to punish for contempt in cases of contumacy of witnesses prior to the enactment of this statute was restricted to imprisonment of the witness in contempt to the end of the session. Neither House considered that its power went beyond this limit. The attitude of Congress in this respect followed the dictum in Anderson v. Dunn that " a period is imposed by the nature of things; since the existence of the power that imprisons is indispensable to its continuance and although the legislative power continues perpetual, the legislative body ceases to exist at the moment of its adjournment or periodical dissolution. It follows that the imprisonment must terminate with that

[1] 34th Cong., 3d sess., *Globe*, p. 445.

[2] *Ibid.*, p. 445.

adjournment."[1] It is true that the House of Representatives punished Woods in 1868 by sentencing him under its common law power to three months in jail for an assault on a member and that his term of confinement extended beyond the session,[2] but this has always been looked upon in Congress as having been unconstitutional. After the enactment of this statute it was clearly possible for the penalties in cases of contempt to be cumulative, that is, either House of Congress defied by a witness could punish him under its common law power, and then report his case to the courts where he could be further punished under the statute of 1857 by fine and imprisonment. That such a procedure was constitutional was the ruling in *In re* Chapman (166 U. S. 668).

It is a curious fact that in spite of the reasons given above for the enactment of the statute of 1857, its adoption by Congress made little difference in the procedure of the Houses of Congress in punishing for contempt. Simonton was not punished under this statute although the immediate reason for its enactment was to inflict greater punishment upon him than the House thought it had under its common law power. The vast majority of contumacious witnesses after 1857 were punished by the Houses of Congress without reference to this statute.[3] This practice was clearly a violation of the third section of the statute which made it mandatory on the presiding officer of the House concerned to report the facts of contumacy of witnesses to the district attorney of the District of Columbia. The most probable reason for this is, that if contumacious witnesses were turned over to the courts as provided for in the statutes, the Houses of Congress lost any further immediate opportunity to coerce testimony from them. On the other hand, if either House

[1] See *infra*, ch. vi, p. 344.

[2] See *supra*, ch. iii, pp. 180-184.

[3] See *supra*, ch. iii, p. 227.

called a contumacious witness before its bar and, because of his persistent refusal to testify, put him in jail for a few days, it could easily happen that he might have a change of mind and decide to answer, thus giving the House the testimony it wanted. This often happened after 1857; witnesses in contempt for refusing to answer questions of an investigating committee have, after being held in custody for a few days, decided to answer and secure their freedom. This meant that the desired information could be secured and hence investigations made more efficient. However, after the decision in Kilbourn v. Thompson (1880) holding that the courts had the power to review the Congressional power to punish for contempt, both Houses of Congress tended to use their common-law power to punish for contempt less frequently and contumacious witnesses were reported to the courts for punishment according to the statutes, for it was realized in Congress that a contumacious witness imprisoned by order of either House would promptly apply for a writ of habeas corpus seeking his release.

An important distinction between the inherent common law power of Congress to punish for contempt and its power to enact legislation providing for punishment for this offense should be made at this point.

The common law power of Congress to punish for contempt in cases of contumacy of witnesses is really not a punitive power at all; it is a coercive power. In other words, neither the House of Representatives nor the Senate has, in a sense, the power to punish witnesses for contempt who refuse to testify or appear before their committees, but they do have the power to imprison a contumacious witness until he does testify, or until the adjournment of the session. This is obviously coercion. There has never been a case where a contumacious witness of either House of Congress has been kept in custody after he has agreed to testify and purge himself of his contempt.

Hence neither House of Congress has the inherent or common law right to sentence a contumacious witness to, say, one year in jail or give him a heavy fine. This is an exercise of punitive power which can be used by Congress only through the enactment of appropriate legislation entrusting such power to the courts.

With respect to the common law power of Congress to compel criminating testimony, there is no doubt that such testimony had been frequently demanded of witnesses by Congressional committees of investigation before the enactment of this statute. In fact, there was always a strong feeling in Congress that criminating testimony could be compelled from witnesses regardless of whether such witnesses were granted a parliamentary pardon for such acts or facts to which they testified or not, on the ground that the Fifth Amendment had no more application to these proceedings than the other Amendments to the Constitution securing personal rights.[1] At any rate, as pointed out above, in order to remove all doubt as to its power in this respect, the act was passed, extending complete pardon in such cases.

The general effect of this statute was, then, to add to the Congressional power of investigation. In the first place, a witness refusing to testify or appear before a Congressional investigating committee was liable not only for his contempt of the particular House concerned, but his offense also constituted a misdemeanor under the statutes, making him liable to jail sentence and a fine. Nor could the court use its discretion and simply fine him. The statute read fine—*and*—imprisonment. In the second place, a witness in testifying before a Congressional investigating committee could not take refuge behind the provision in the Fifth Amendment protecting persons from demands for criminating testimony.

The second section of the statute containing the immunity

[1] See *supra*, ch. iv, p. 251.

provisions for witnesses compelled to give criminating testimony did not prove the valuable addition to the statutes of the Untied States anticipated by its friends. It was found, in many respects, to work greater evil than good. It continued in force until 1862, when it was amended, after part of it was found "to have cheated justice of its dues more often than it had aided its administration, and its existence had come to be a crying evil." It was repealed by the unanimous vote of both Houses of Congress.[1]

The debate in Congress on the enactment of the statute of 1862 is instructive in that it indicates the success of the statute of 1857 and why a portion of it was repealed.

On January 16, 1862, Mr. Wilson from the Committee on the Judiciary, introduced a bill amending the provisions of the second section of the Act of January 24, 1857.[2] He stated that the bill proposed to amend the second section of the act referred to, so as to provide that the testimony of witnesses examined before either House of Congress, or by a committee of either House, should not be used as evidence in any criminal prosecution of such witness in any court of justice, provided that no official paper or record produced by such witness in such examination be included within the said privilege of said evidence so as to protect such witness from any criminal prosecution. The bill further provided that hereafter no witness "shall be allowed to refuse to testify to any fact, or to produce any paper, touching which he shall be examined by either House of Congress, or by any committee thereof, for the reason that this testimony may tend to disgrace him or otherwise render him infamous; provided that nothing contained in the bill shall exempt any witness from prosecution or punishment for any felony committed by him in testifying."

[1] 37th Cong., 2d sess., *Globe*, pp. 364, 430.

[2] *Ibid.*

Mr. Wilson said the purpose of this amendment was to do away with that portion of the second section of the Act of 1857, which has operated as a general pardon concerning all offenses in relation to which a witness before a Congressional committee may have been called to testify, or in relation to which a witness presenting himself voluntarily before a committee may have been permitted to testify. Under the second section of this act, he explained,

> the defendants in the case of the Government against Russell and Floyd were discharged from all liability concerning the embezzlement of the Indian trust bonds, and all other witnesses who may testify concerning any act, no matter how criminal, before an investigating committee of Congress, are discharged in like manner. It is for the purpose of remedying this evil that this amendment of the law is proposed.
>
> I may say further, that I understand that almost every day persons are offering to testify before the investigating committees of the House in order to bring themselves within the pardoning power of the Act of 1857, and it is to prevent any more of such cases of pardon that we ask the House to pass this bill.

The bill was passed without debate.[1]

There was some debate on the bill in the Senate,[2] although most of the opposition was to the meaning of certain phrases in the amendment. Mr. Turnbull, Senator from Illinois told the Senate that the Act of 1857 had operated so as to discharge from prosecution and punishment persons who were brought before these committees and testified touching matters for which they might have been prosecuted. In fact he claimed this Act offered an inducement for the worst criminals to appear before an investigating committee. "Here is a man who stole two millions in bonds, if you please, out

[1] 37th Cong., 2d sess., *Globe*, p. 431.

[2] *Ibid.*, pp. 428, 429, 430, 431.

of the Interior Department. What does he do? He gets himself called as a witness before one of the investigating committees, and testifies something in relation to that matter and then he cannot be indicted." He showed how that very case occurred, the very clerk who purloined two millions in bonds from the Interior Department was discharged and the indictment against him quashed, because he had made some statement in reference to the matter before an investigating committee. "So it was with the former Secretary of War; there were two or three indictments against him in this district, but my information is that they were all quashed, upon the ground that he also had testified before a Congressional Committee."

Protest was made in the Senate that if this amendment prevailed, witnesses would be compelled to testify against themselves with no exemption from prosecution for what they had said. Senator Wade in answering this objection said:

I do not care what the old common law was. Combinations are formed here by great numbers of men to defraud the Government, and no light can be had while any of them can say, I cannot testify in this case without criminating myself or tending to disgrace myself. The rule might do well enough perhaps in its application to well defined crimes at common law, such as larceny, manslaughter, or any of that class of offenses that generally involve not more than one or two persons, but the delinquencies into which our committees inquire frequently involve vast masses of men, all combined and keeping each other's secrets for the purpose of defrauding the Government. The principles of the common law are altogether too narrow to afford us opportunity to attain justice in such cases. . . . I have not dared to enter upon certain investigations before a committee of which I am a member, for the reason that the law as it is now, exculpates great rascals from the responsibility they owe to the government, and gives entire immunity to any man touch-

ing any matter you see fit to inquire of him about. I wonder how such a law was ever passed. I never should have believed that such a law was on your statute book if it had not been suggested to me, and I had not found it. I was astonished to find a law in existence providing that if you inquired of any witness in regard to any delinquency that had arisen, he should be exculpated from that moment from the consequences of his crime.

The bill was passed without amendment.

Of course it is obvious that the second section of the Act of 1857 overreached itself. It will be noted that by this law full pardon was given to a witness on account of every act he testified to before the Houses of Congress or its committees. At the time this section was considered, Cushing was cited as authority for such an act.[1] However Cushing did not say that it was customary in England to grant a pardon for every act testified to before a legislature, but rather that no evidence given in either House might be used against the witness in any other place. It was exactly this form of statement that the Act of 1862 followed.

If the practice of the English Parliament was to exclude such evidence from being used in any other place as Cushing states, then Congress went Parliament one better by granting full pardon to a witness for any act to which he might testify.

That Congress can easily go to extremes is proven by the legislative history of these two acts, for the act of 1857 was passed by a nearly unanimous vote and repealed five years later by a unanimous vote.

In 1873 a general revision was made of the United States Statutes and all the above acts were included in the United States Revised Statutes as sections 101, 102, 103, 859 and 104 as follows;

[1] See *supra*, ch. v, p. 308.

Sec. 101.—The President of the Senate, the Speaker of the House of Representatives or a Chairman of the Committee of the Whole, or of any committee of either House of Congress is empowered to administer oaths to witnesses in any case under their examination.

Sec. 102.—Every person, who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Sec. 103.—No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

Sec. 859.—No testimony given before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the same privilege.

Sec. 104.—Whenever a witness summoned as mentioned in sec. 102, fails to testify, and the facts are reported to either House, the President of the Senate, or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or the House to the District Attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

Subsequent interpretation of these statutes pertaining to

witnesses brought out many interesting questions and also a varied procedure in Congress.

One of the most important questions debated in Congress after these acts were passed, was, did Congress by enacting this legislation, surrender its common law power to punish for contempt, that is, was it not proper to interpret the action of Congress in enacting these statutes as meaning that it had now hung up a definite rule as to what constituted a contempt and that in the future when a witness refused to testify it would not punish such refusal as a contempt by holding the contumacious witness in custody until he purged himself or was released at the end of the session, but rather would immediately certify such refusal to the district attorney as the statutes provided, in which case this refusal of the witness to testify would be punishable as a misdemeanor.

For example, we find Senator Thurman saying in the case of Z. L. White and H. J. Ramsdell:[1]

> Whatever may have been the law of the courts in regard to the power to punish for contempts, or whatever may have been the law of the Senate in regard to the power to punish for contempts, I am perfectly well satisfied in my own mind that since the enactment of the statute that makes it an indictable offense for a witness to refuse to answer proper questions when put to him by the Senate or one of its committees, we can no longer exercise the common law power of punishing for contempt.

For he said that if the Senate should punish the above mentioned witnesses and put them in jail, "the punishment that we inflict would bar an indictment in the District court, for the Constitution says in plain terms that no person shall be twice put in jeopardy for the same offense."

This argument was answered in the same case by Senator Carpenter from Wisconsin who said:

[1] 42 Cong., 1st sess., *Globe*, p. 849. See *supra*, ch. iii, pp. 190-197.

The statute referred to by the Senator from Ohio in words provides that, that trial and punishment provided for in that first section shall be, "in addition to the pains and penalties now existing."[1] It is therefore apparent on the face of the statute that it was not the intention of the framers to take away from this body the power to do anything it could have done in such a case as this if that statute had not been passed.

It will be recalled that this latter statement is in complete accord with the intentions of the committee which reported this bill to the House,[2] and also with the practice of the House.

The case of White and Ramsdell occurred in 1871, hence before the revision of the statutes. After the revision it will be noted that the words, "In addition to the pains and penalities now existing" were dropped. Naturally this action furnished further ammunition for those who supported Senator Thurman's view.

In three of the most important cases of contumacious witnesses appearing before Congress, namely, Richard Irwin,[3] Hallet Kilbourn,[4] and Chapman,[5] this question was debated at length, to wit, what was the effect of the enactment of the statute of 1857 and the revision thereof on the power of Congress to punish for contempt.

In Irwin's case, the point was made that inasmuch as the revision omitted the words, "In addition to the pains and penalties now existing" this indicated that Congress intended to surrender its power to punish for contempt in cases of refusal of witnesses to testify, that it realized that punishing a witness for contempt and then later having him

[1] 42d Cong., 1st sess., *Globe*, p. 849.

[2] See *supra*, ch. v, p. 306.

[3] See *supra*, ch. iii, pp. 202-209.

[4] *Ibid.*, pp. 211-225.

[5] See *supra*, ch. iv, pp. 262-268.

punished for a misdemeanor, that is, cause him to be punished twice for the same offense, was contrary to that clause of the Constitution which prohibits any person "from being twice put in jeopardy of life and limb because of any offense."

Mr. Lawrence, member of the House from Ohio, ably opposed this view. He said:

Sir, there are or may be two offenses. There may be a crime against the public, and there may be an offense against the authority and power of the House. When we punish for contempt it is an exercise of the power of this House to punish for an offense against this House. That clause of the Constitution which prohibits any person from being twice put in jeopardy of life and limb because of any offense, has no reference to the exercise of common parliamentary power by the House of Representatives. It relates only to the administration of criminal justice and to those offenses which by law are classified as crimes, and which may be punished in the courts. . . . It has been said that the Revised Statutes containing the law giving the courts power to punish a refusal to testify do not contain the words, "in addition to the pains and penalties now existing." They were in the revision dropped out as mere surplusage—as unnecessary. That revision, as we all know, made no change in the law.[1]

When Irwin was brought before the Supreme Court of the District of Columbia on a writ of habeas corpus, Mr. Justice McArthur, in dismissing the writ said:

There can be no doubt that either House of Congress has the right of committing for contempts—all contempts which infringe upon the order, the dignity, or the purity of their legislation, and for this purpose it is not denied but that they have the power of examination, of investigation, and of calling witnesses into their presence or before their committees, and of adminis-

[1] 43d Cong., 2d sess., *Record*, p. 181.

tering oaths and putting inquiries and of punishing a refusal to answer. These powers are so very clearly established, now, that the learned counsel has not impeached them, unless Congress, by the enactment of the Statute of 1857, has abrogated this almost indispensable power in Congress. It is to be observed that the statute applies only to a particular species of contempt, and that it is to witnesses who refuse to answer questions upon subjects of investigations before Congress or before its committees.

It is said, inasmuch as Congress has created the act of a witness refusing to answer, a misdemeanor, they have abolished it as a contempt. I cannot so regard it. It appears to me that the punishment provided in the statute for this offense does not merge the contempt and does not abolish the power of the House. It has not been so understood from the time of the enactment of the statute, and I believe this is the first time that aspect of the case has ever been presented for judicial examination. There is nothing clearer than that the same act may be both a misdemeanor and a contempt.[1]

Justice McArthur mentioned the case of Samuel Houston as supporting this view [2] for he was, after having been tried and convicted and punished for contempt of the House, prosecuted for a misdemeanor. His defense to that action was his conviction before the House for contempt, and that he could not be twice punished for the same offense. This, of course, was overruled, and notwithstanding his distinguished position, he having formerly himself been a member of the House, was punished both for a contempt and a misdemeanor before the two jurisdictions.

Mr. Shellabarger, counsel for the Sergeant-at-Arms in Irwin's case, made a very able and exhaustive statement of

[1] 43d Cong., 2d sess., *Record*, p. 707 (a complete statement of the judicial proceedings in this case is printed in the *Record* beginning at p. 707).

[2] *Ibid.*, p. 522.

the powers of the House to punish for contempt and he maintained in his brief that

the enactment of the statute of 1857 and the revision thereof have not repealed or modified the power of the House to punish for contempt, because, first, this implied constitutional power could not be legislated away by a statute, second, that there was nothing in the original act purporting to show that it intended to strip the House of its power to punish for contempt, third, that this contumacy of a witness as to contempt and also as to misdemeanor is in violation of the Constitution, and is the infliction of a double punishment for the same offense was a mistake, that rather it was not unusual for the same act to constitute several offenses against jurisdictions or governments and finally the practice of the House itself is the highest possible authority on the question of the joint construction of the statute of 1857, and the decisions of the two Houses have been uniform ever since this act was passed; that it was not meant to strip the two Houses of one of their original and highest jurisdictions, even if it were constitutionally competent to do so by the act of Congress.[1]

In Kilbourn's case a brief was submitted by the contumacious witness to the House, in which he claimed that Congress had surrendered its power to punish for contempt in such cases to the courts by the Act of 1857 and hence could not punish him.[2] This question was brought to a direct issue, when the Speaker having certified to the District Attorney of the District of Columbia the fact of the refusal of Kilbourn to answer certain questions, an indictment was found by the grand jury and the Speaker was notified that a warrant had been issued for the arrest of the witness. As he was already in the custody of the Sergeant-at-Arms, as a punishment by the House for his contempt, the question arose,

[1] 43d Cong., 2d sess., *Record*, pp. 529-533.

[2] 53d Cong., 2d sess., *Sen. Misc. Docs.*, vol. xii, p. 539.

should the House surrender him to the court? When the Marshal appeared before the Sergeant-at-Arms and asked to see the prisoner, his request was refused, and the Sergeant-at-Arms reported his action to the House and asked for instructions, which put the question squarely before the House.

The House debated at great length as to whether they should surrender Kilbourn to the Marshal of the court under the warrant issued for his arrest, after the indictment had been found against him. To begin with, it seems rather unwise for the House to have allowed this indictment to be returned until they had finished with the prisoner. But, apparently the Speaker was more prompt in performing his "duty" in this case, than in others, for he, very early in the proceedings, certified the facts of the refusal of the witness to answer certain questions. When the information reached the House that the indictment had been returned, he stated that he had done his duty as he saw it under the statute. One of the members of the House said they couldn't blame the Speaker for this, as it was his duty to certify the facts to the District Attorney.

It was the general opinion in the House as seen in the debates that whether they should surrender the prisoner to the court on the warrant issued for his arrest, was a question within their own discretion. And it was pretty generally agreed that that discretion should be exercised so as in no degree to waive or give up the power of the House to hold persons in its custody in order to compel them to disclose facts which the House had a right to inquire into.[1]

Eventually the following resolution was adopted:

That Hallet Kilbourn, a recusant witness, having by this House been adjudged guilty of a contempt of its authority by reason of his refusal to answer to certain questions and refusing to

[1] 44th Cong., 1st sess., *Record*, pp. 2008-2020.

produce in answer to the subpoena duces tecum certain documents, books, papers, etc. before a special investigating committee of this House. and said Kilbourn because of said contempt and the judgment of the House being now by its order and said judgment in the custody of the Sergeant-at-Arms in the common jail of the District of Columbia, there to remain in custody until he shall communicate to this House through said committee that he is ready to appear before said committee and make answer to said questions and obey said subpoena duces tecum, therefore, because of the facts and premises aforesaid, the said Sergeant-at-Arms is ordered to retain the custody aforesaid of said witness and not part with his custody or deliver him up to any other person, officer, court or tribunal until the further order of this House.

The action of the House in refusing to surrender Kilbourn in answer to the warrant issued by the court under the terms of the Act of 1857 was in direct opposition to its procedure in the case of John W. Wolcott, where it adopted the following resolution:

Whereas, on the fifteenth day of February last, the House by its resolution did commit J. W. Wolcott to the jail of the District of Columbia for an infringement of the privileges of the House in refusing to answer satisfactorily certain questions put to him by order of the House, and is still held in custody by said order and whereas, afterward, in pursuance of the provisions of the law, the Speaker of the House did certify to the District Attorney of the District of Columbia the facts pertaining to said case, and the same were laid before the grand jury of the district, and a presentment was thereupon found against said Wolcott for the same offense; and whereas, the court in which said presentment is pending have determined that said Wolcott cannot be tried on said presentment so long as this House holds him in custody under its rights of privilege; Therefore, Resolved, That the Sergeant-at-Arms is hereby authorized and directed to cause said Wolcott to be released

from jail, and to deliver him over to the marshal of said District of Columbia, or other person authorized to receive him, to answer to the presentment pending in said court.[1]

Here we note that instead of insisting upon their right to punish still longer, or to the expiration of the session, the House decided to surrender the prisoner to the courts. It was said in the debates in connection with this case, that "a remedy has been provided by law, fines and imprisonment have been designated by the supreme legislative authority of the country, and without saying that we have no right to hold him longer, we turn him over to the court to be tried as other citizens are tried for offenses committed against the law."

After the refusal of the House to comply with the terms of the warrant issued in Kilbourn's case, the prisoner petitioned the court for a writ of habeas corpus. The writ was issued and the House was soon notified that it was called upon by the Supreme Court of the District of Columbia to produce Kilbourn before said court. At once there developed one of the most famous debates ever occurring in Congress on the personal rights of citizens, the powers of Congress to punish for contempts and the powers of the court to review the proceedings of Congress in such cases.[2] Much of this debate is given in another place in this study.[3]

The matter of the habeas corpus was referred to the Committee on the Judiciary for their examination and report as to what the Sergeant-at-Arms should do.[4] A few days later, the Committee reported a preamble and resolution which after stating the facts in the case, suggested to the House, that "the Sergeant-at-Arms be directed to make a careful

[1] 35th Cong., 1st sess., *Journal of the House*, Mar. 22, 1858.

[2] 44th Cong. 1st sess., *Record*, pp. 2482-2500 and pp. 2513-2532.

[3] See *supra*, ch. iii, pp. 211-225.

[4] 44th Cong., 1st sess., *Record*, p. 2417.

return of the writ, setting out the cause of detention of said Kilbourn and to retain the custody of his body, and not to produce it before the said judge or court without the further order of the House."

The argument following the submission of this report has already been analyzed.[1] The final action of the House was to repudiate the report of the Committee and recommend that the Sergeant-at-Arms produce the body of Kilbourn in the court in answer to the writ of habeas corpus.

The general attitude of the House in the case of these conflicts of power with the courts was that it had not surrendered its common law power to punish for contempt by the enactment of the statutes of 1857 and 1873 and that it could exercise its own discretion as to whether it would surrender a prisoner to the courts on issue of a warrant. However, the House was not so certain of its power to withhold a prisoner from the courts in a case where his release was demanded on authority of a writ of habeas corpus, where the purpose of this court was obviously to review the power of the House in the premises.

The debates and action in Irwin's case show how undecided the House was about this matter, for the House first passed a resolution instructing their Sergeant-at-Arms not to produce the body in court, then it reached a sort of mixed conclusion, that the Sergeant-at-Arms should take the body before the court but not lose custody of it. The court replied, "We can accept no such delivery as that; if the prisoner is not delivered into the custody of this court, the court does not consider a proper return made."

Finally, it was urged by some members of the House that such action was disrespectful to the court, because when the witness came before the court, his body being produced, "we could not deny to the court the practical jurisdiction

[1] See *supra*, ch. iii, pp. 218-224.

over the body." It was for that reason that the House adopted the following resolution, which directed the Sergeant-at-Arms to take the body with him in answering the writ and say nothing about the custody:

> That the Sergeant-at-Arms be, and hereby is, ordered to make a careful return to the writ of habeas corpus in the case of Richard B. Irwin, that the prisoner is duly held by the authority of the House to answer in proceedings against him in contempt and that the Sergeant-at-Arms take with him the body of said Irwin before the court when making such return as required by law.[1]

The court, in reviewing this case asserted strongly its power to review such proceedings of Congress, saying, "It is entirely competent for any court of justice to inquire into the privilege of Congress, and the doctrine that Congress is the judge, and the sole and exclusive judge of its own privileges, can never be sustained."[2]

However, in Kilbourn's case we find the House Committee on the Judiciary flatly denying the court's power to review cases of contempt under authority of a writ of habeas corpus; moreover, while the report of this Committee was rejected, there is no gainsaying the fact that Congress fully expected the court to return their prisoner, as had been done in Irwin's case, that while they had surrendered the prisoner, they had not surrendered the right to hold him in custody, but had simply given him up to the court because they did not want to be disrespectful. The debates indicate that their surrender of the prisoner was due as much to their fear and respect for the writ of habeas corpus as anything else. It is obvious in this case that the House feared too much derogation of the personal rights of citizens.

[1] 43d Cong., 2d sess., *Record*, p. 724.

[2] *Ibid.*

This question of the power of the courts to review proceedings in contempt was settled, fully and decisively by the United States Supreme Court in the case of Kilbourn v. Thompson, which decision reaffirmed the decision of Justice McArthur in Irwin's case, sustained the issue of the writ of habeas corpus in Kilbourn's case and decided that the courts had power to inquire into the exercise of the power of Congress to punish for contempt.[1]

It should be made clear at this point that Kilbourn v. Thompson did not hold that the Houses of Congress had surrendered their common law power to punish for contempt in cases where they had jurisdiction, but rather the courts could review this power by habeas corpus proceedings.

It should also be noted in this case that the House ignored the warrant issued by the court according to the procedure outlined in the Acts of 1857 and 1873. In fact we have suggested before that it was common practice for both Houses to punish contumacious witnesses regardless of the above mentioned statutes.[2] Whether Congress surrendered its common law power to punish for contempt by the enactment of these statutes was decisively ruled upon in *In re* Chapman [3] where it was held that the fact that Congress had made the refusal of a witness to answer proper questions, a misdemeanor against the United States, did not divest Congress of the inherent power to punish for contempt.

Study of Congressional procedure in investigations and punishment for contempt shows that both Houses acted irregularly under the statutes enacted, referring to such investigations and contempt cases. Contumacious witnesses were not always certified to the District Attorney for indictment. This act was more generally interpreted as a measure

[1] See *infra*, ch. vi, pp. 350-353.

[2] See *supra*, ch. v, 227n.

[3] See *infra*, ch. vi, pp. 358-361.

to be used where it was necessary to add to the penalties already existing. Different Speakers of the House interpreted their "duty" under the statute of 1857 in various ways. Some certified contumacy in a witness immediately, while others neglected to do so at all.[1]

One outstanding feature in the evolution of these statutes is the determination of Congress to retain its "common law" or implied power to punish for contempts, thus leaving the offender to guess what might constitute a contempt and the subsequent punishment.

After the experience Congress had with Section 2 of the Statute of 1857, one would hardly expect another demand for the identical provision in this section which was found to have worked so much mischief and which was repealed by the Act of 1862, yet in 1876, we find another investigating committee thwarted by a reluctant witness and hence believing it was necessary that Congress enact such a law.

The Committee on Expenditures in the War Department had been charged under a general resolution to investigate expenditures in the said Department and to send for persons and papers.[2] At the outset, this Committee found such unquestioned evidence of the malfeasance in office of Secretary of War, W. W. Belknap, that they reported the evidence to the House, together with a resolution calling for the impeachment of Belknap. The report of the Committee was referred to the Committee on the Judiciary, with orders to draw up articles of impeachment.

This Committee, in reporting to the House,[3] stated that practically all the evidence had been based on the testimony of one witness, Caleb P. Marsh, and that before reporting articles of impeachment, they would like to have further

[1] See *supra*, ch. iii, pp. 203-204.

[2] 44th Cong., 1st sess., *Record*, p. 414.

[3] *Ibid.*, p. 1564.

evidence. They also reported that Marsh, in his testimony before the Committee on Expenditures, had shown that he knew other facts which affected the charges against Belknap, and that the Committee on the Judiciary would like to have further testimony from him. However they had learned that Marsh, after testifying before the Committee on Expenditures, had fled to Canada.

So the Committee on the Judiciary recommended to the House that they be empowered to take further proof and to send for persons and papers. In addition, in order to make their investigation effective they recommended the passage of two bills by Congress, one of which was passed by the House by an almost unanimous vote.[1]

This bill was substantially a reenactment of the law of 1857, its purport being that

> if a witness shall be brought before either House of Congress, or a committee of either House, or before the Senate acting as a court of impeachment, and is required to testify to any given act or fact, and protests against giving his testimony on the ground that it may incriminate himself, and is thereupon compelled to give it, that he shall be forever free from any liability to answer criminally in any court of justice and secure from any forfeiture or penalty of any kind on account of the act or fact to which he shall be so required to testify.

The Committee on the Judiciary felt that if Congress would pass this bill immediately, Marsh having a legislative pardon, would come back to the United States and testify. It was urged by the Committee that Parliament having a rule similar to the statute of 1862, was accustomed to pass special acts indemnifying witnesses against the consequences of their testimony. "Why not," they said, "pass a general act which will apply to all such cases of need." That there

[1] 44th Cong., 1st sess., *H. R. Rep. no. 2572*, in *Record* at p. 1564.

might be a conspiracy between accomplices of an accused party to come before a corrupt committee and to testify before that committee, and in that way be acquitted of the offenses of which they might be guilty, was admitted by the Committee on Judiciary to be possible, yet they said, "Congress was not composed of scoundrels and such a case would not be likely." With but slight protest, and that largely political, the bill passed the House by a vote of 206 to 8, 75 not voting.[1] It was transmitted to the Senate, where it was referred to the Committee on the Judiciary, which committee reported adversely.[2] It was not further acted upon by the Senate.

In refusing to approve the bill, the Senate Committee on the Judiciary stated in their report that upon, "principles of constitutional consideration, and of expediency involved in questions of this character, the bill seems to us to be open to many fatal objections." It was urged in the report that the bill provided in substance that every criminal, from the traitor down to the backwoodsman who sells a glass of alcoholic liquor without a license, who shall testify, against his protest, before either House of Congress, or any of its committees, shall be relieved *ipso facto* from all punishment for his crime, in respect of any fact or act concerning which he shall be required to testify. The whole body of offenders against the law are thus enabled to escape if they comply with the condition named.

In other words, they said, the enactment of this bill would be a legislative pardon to all such criminals under the circumstances named.

The other main objection to the bill, namely, that it would be unconstitutional, was based on the ground that the Constitution confers the power to grant pardons upon the ex-

[1] 44th Cong., 1st sess., *Record*, p. 1571.

[2] 44th Cong., 1st sess., *Sen. Rep. no. 253.*

ecutive and not upon the legislative department, that the powers of Congress, unlike those of the British Parliament, are expressly enumerated in the Constitution, and moreover the powers enumerated therein require and create a clear and absolute division and separation of powers. The enactment of this statute, with its resulting delegation to both Houses of Congress of the power of granting pardon, would be in derogation of the rights of the executive branch and contrary to the Constitution.

As to British practice, the Committee said, special acts of indemnity were passed in particular cases, that no general law had been enacted carrying such provisions.

Finally they stated that the experience Congress had with the statute of 1857 should be sufficient to indicate the deleterious character of such legislation. The enactment by Congress of the Act of 1862 and this subsequent demand for a return to the original terms of the statute of 1857 represents the inherent difficulty Congress has in adjusting its claims for inquisitorial power with the rights of the citizen as found in the Constitution. There is no doubt that the full immunity granted witnesses under the original law was clearly within the requirements of the Fifth Amendment. Yet, as has already been shown, it led to disastrous results. On the other hand, there is grave doubt as to the constitutionality of the Act of 1862, and as previously stated, Senate Committees have hesitated to use their power of compelling testimony where a witness claimed immunity under the Fifth Amendment from the demand for criminating testimony.[1]

[1] See discussion, *supra*, ch. iv, pp. 287-288 also ch. vi, pp. 389, 390.

Everhart, Fall's son-in-law, twice refused to testify to the Senate Committee on Public Lands during the "oil investigations" of 1924, claiming immunity under the Fifth Amendment. The Committee did not press their demand for testimony, preferring to take no chances on a ruling by the

The scope of Congressional statutory authority in making investigations was widened by the enactment of the following statute which was passed by Congress on April 18, 1876:

That the presiding officer for the time being, of the Senate of the United States shall have the power to administer all oaths and affirmations that are or may be required by the Constitution, or by law, to be taken by any Senator, officer of the Senate, witness, or other person, in respect to any matter within the jurisdiction of the Senate.[1]

This statute was further amended in 1884 as follows, "That any member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a member, or any committee thereof."[2] The laws now pertaining to Congressional investigations are found in the United States Code, Act of June 30, 1926, Title 2, sec. 191-195.[3]

courts that the statute of 1862 and its subsequent revisions were violative of the constitutional guarantee.

Repeal of the Daugherty Act, thus making the statute of limitations as to all but capital offenses against the United States, three years, cut away the immunity of Everhart and he testified freely to the committee during the recent (1928) Senate inquiry into the Continental Trading Company.

[1] See Appendix B.

[2] *Ibid.*, p. 432.

[3] *Ibid.*, pp. 432-435.

CHAPTER VI

Judicial Review of the Inquisitorial Power of Congress

PART I

POWER OF CONGRESS TO COMPEL TESTIMONY AND PUNISH FOR CONTEMPT

It is obvious from a study of Congressional precedent that both Houses of Congress frequently used the power of compulsory investigation indiscriminately to apply to (1) cases where they acted in a judicial capacity, such as election disputes, impeachment proceedings or cases involving their enumerated or implied privileges, (2) cases of investigation into the administration of the law, (3) cases of investigation for the purpose of securing information in order to legislate wisely. The authority for the exercise of this power was found in the Constitution by necessary implication in support of the legislative function. While strenuous opposition developed in Congress at times to the exercise of this power, yet it was seldom that this opposition defeated its exercise. A formidable array of precedents early established the right of Congress to use this power as a necessary aid to its function of legislation. Hence it is more than passing strange that although this power was strenuously opposed in Congress and in spite of the fact that it was often used in apparent violation of the rights of due process of law and the personal guarantees found in the first ten amendments to the Constitution, the right of Congress to use this power as a necessary adjunct to its legislative function was not clearly

established until the case of McGrain v. Daugherty decided in 1927.[1]

Five decisions of the United States Supreme Court have a direct bearing on this question.[2] In addition there are several decisions handed down by inferior federal courts which are in point. The attitude of the courts toward the exercise of this power by Congress can also be interpreted to some extent from its consideration of cases of contempt for refusals to testify before Federal administrative commissions, whose power and authority to investigate are quite similar to that of Congressional investigating committees.[3]

It was not until 1821 that the Federal courts had occasion to pay attention to the powers of Congress to punish for contempts. At this time an action was brought against the Sergeant-at-Arms of the House of Representatives for assault and battery and false imprisonment by John Anderson,[4] to which he pleaded that he had arrested the plaintiff under an order of the House, declaring that the plaintiff had been guilty of "a breach of the privilege of the House and of a high contempt of the dignity and authority of the same," that he had brought the plaintiff before the bar of the House, that the plaintiff had been found guilty and was reprimanded by the Speaker and discharged, which was done.

Upon demurrer, this plea was held good, the Supreme Court declaring that the only question was, "Whether the House of Representatives can take cognizance of contempts committed against themselves under any circumstances."

[1] McGrain *v.* Daugherty, 273 U. S. 135 (1927).

[2] Anderson *v.* Dunn, 6 Wheaton 204 (1821), Kilbourn *v.* Thompson, 103 U. S. 168 (1880), *In re* Chapman, 166 U. S. 661 (1897), Marshall *v.* Gordon, 243 U. S. 521 (1917), McGrain *v.* Daugherty, 273 U. S. 135 (1927).

[3] See *infra*, ch. vi, pt. ii.

[4] Anderson *v.* Dunn, 6 Wheaton, 204.

Neither the warrant nor the plea described gave any clue to the nature of the act which was held to be a contempt of the House, though the debates in the House show that it was an attempt to bribe a member.[1]

The Court admitted that there is no express power given by the Constitution to either House to punish for contempts, except where committed by their own members. "Nor does the judicial or criminal power given to the United States in any part, expressly extend to the infliction of punishment for contempt of either House, or any one coordinate branch of the Government." [2] The Court also admitted that such a power must therefore be derived from implication, although the genius and spirit of our institutions were hostile to the exercise of implied power. But notwithstanding, the court pointed out that there is in the Constitution no grant of powers which does not draw after it others which are auxiliary and subordinate, and it is necessary that Congress have the power to punish for contempts, otherwise it is "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may meditate against it." [3]

The Court further said, that to leave such a power, undefined and discretionary to Congress, was not dangerous, for,

> public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. . . . Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers, as the safety of the people is the supreme law.[4]

The decision in this case, therefore, admitted the right of Congress to punish a person not a member for contempt.

[1] See *supra*, ch. ii, pp. 66, 67.

[2] Anderson *v.* Dunn, 6 Wheaton 204.

[3] *Ibid.*, p. 228.

[4] *Ibid.*, p. 227.

What acts might constitute a contempt of Congress was not considered in the case, the Court saying:

As to the minor points made in this case, it is only necessary to observe that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the House of Representatives would have issued it without fully establishing the fact charged on the individual.[1]

However the Court restricted the power to punish, saying:

But although the offense be held indefinable, it is justly contended that it need not be indefinite. Nor is it so. We are not considering the extent to which the punishing power of Congress by a legislative act may be carried. On that subject, the bounds of their power are to be found in the provisions of the Constitution. The present question is, what is the extent of the punishing power which deliberative assemblies of the Union may assume and exercise on the principle of self preservation. Analogy and the nature of the case furnish the answer, —the least possible power adequate to the end proposed—which is the power of imprisonment. . . .[2]

As to the length of imprisonment, the Court believed

a period is imposed by the nature of things; since the existence of the power that imprisons is indispensable to its continuance and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows that the imprisonment must terminate with that adjournment.[3]

It was added that

this view of the subject necessarily sets bounds to the exercise

[1] Anderson *v.* Dunn, 6 Wheaton 234.

[2] *Ibid.*, pp. 230, 231.

[3] *Ibid.*, p. 231.

of a caprice, which has sometimes disgraced legislative assemblies, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions there is no more danger of their being revived, probably, than our own.[1]

This case holds then that there are certain circumstances under which a person not a member may be punished for contempt by the Houses of Congress, a power which is analogous to that exercised by courts of justice. In other words, a general power to punish for contempt was held to be vested in the House of Representatives as a necessary incident to the exercise of its functions and its adjudication was held sufficient to establish the fact of contempt.

Naturally this case was looked upon in Congress as sanctioning its power to punish for contempt in the course of its investigations and it stood for sixty years as the only case on the subject.

While it is not the purpose of this study to review in detail the attitude of the English courts towards the exercise by the legislative department of the power to punish for contempt, the general trend of English court opinion should be noted, because of its influence on American courts reviewing the exercise of the same power. The decision in Anderson *v.* Dunn was undoubtedly influenced by the English decisions, the general weight of which up to this time was on the side of admitting the power of Parliament to punish for contempt or for breaches of its privileges.[2] Moreover, the Eng-

[1] Anderson *v.* Dunn, 6 Wheaton 231.

[2] Earl of Arundel & Devonshire, 27 H. 6, Burdette *v.* Abbott, 14 East 1 (1811), Case of George Ferrers, 1 Hats. 56, 57 (1543), Regina *v.* Paty, 2 Ld. Raymond 1105 (1704), Entick *v.* Carrington, 19 How. State Trials 1047 (1765), Murray's Case, 1 Wils. 299 (1751), Rex. *v.* Flower, 8 Term Rep. 314 (1799), Rex *v.* Hobhouse, 2 Chitt. Rep. 207 (1820).

lish courts usually refused to question the decisions of either House of Parliament, commonly asserting that, "It is not a proper subject for us to enter into," or as C. J. DeGrey said in Brass Crosby's case, "this court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law, for the law by which the Commons judge of their privileges is unknown to us." [1]

On the other hand the famous case of Stockdale v. Hansard [2] held that neither House of Parliament can, by simply declaring an act or procedure to be one of its privileges, make it so; that when orders or resolutions of either House controvert clearly the personal rights of the citizen to an unreasonable extent, he may obtain relief in the courts. This decision was referred to in Kilbourn v. Thompson as showing that the courts have the right to review the privileges of legislative bodies.

Generally the courts in England have refused to inquire into Parliament's power to punish for contempt although they have distinguished between the question when the power of Parliament to commit arises directly and when it arises incidentally.[3]

Anderson v. Dunn had reference to the power of the House to punish for contempt. The power of the Senate in similar cases was reviewed by a subordinate Federal court in 1848.[4] It appears that John Nugent furnished a copy of the Treaty between the United States and the Republic of

[1] Brass Crosby's Case, 3 Wils. 199.

[2] Stockdale *v.* Hansard, 9 Adolphus & Ellis 1 (1837).

[3] For the best statement of the attitude of the English courts on this point see Burdette *v.* Abbott, 14 East 1. Rapalje says on this point, "In England, the doctrine of the omnipotence of Parliament shuts the door to such inquiry, and each house of Parliament is the exclusive judge of the contempt of its own authority." Rapalje, Stewart, *Treatise on Contempt*, sec. ii, p. 4.

[4] *Ex parte* Nugent, 18 Fed. Cas. No. 10375, p. 471 (1848).

Mexico with certain amendments thereto by the Senate and the proceedings thereon, to the *New York Herald,* which published the same. The proceedings of the Senate in reference to the Treaty were held in secret session of that body. Nugent was called before the Senate, sworn as a witness and asked certain questions. He declined to answer, whereupon George M. Dallas, Vice-President of the United States, issued a warrant to the Sergeant-at-Arms for the arrest of Nugent, and he was accordingly arrested and held in legal custody. Nugent applied to the Circuit Court of the District of Columbia for a writ of habeas corpus. The Sergeant-at-Arms filed a return to the writ, setting forth his official position that he held Nugent by virtue of the order of the President of the Senate and Vice-President of the United States, and that said Nugent had declined to answer certain questions when brought before the bar of the Senate, for which he was committed for contempt.

The court considered the two principal questions as, (1) has the Senate of the United States jurisdiction and power to punish contempts of its authority, and (2) if so, whether this court, upon this habeas corpus, can inquire into the question of contempt and discharge the prisoner?[1]

Ancillary questions which were answered in this case were, (1) could the Senate of the United States punish a person who was not a member of that body for contempt? (2) could the Senate inquire who had violated its rules? (3) did the Senate have the right to hold and pronounce judgment in secret sessions for a contempt which took place in a secret session?

The court in answering the first main question said:

> The jurisdiction of the Senate in cases of contempt of its authority depends upon the same grounds and reasons upon which the acknowledged jurisdiction of other judicial tribunals

[1] *Ex parte* Nugent, 18 Fed. Cas. No. 10375, p. 472 (1848).

rests, to wit, the necessity of such a jurisdiction to enable the Senate to exercise its high constitutional functions—a necessity at least equal to that which supports the like jurisdiction which has been exercised by all judicial tribunals and legislative assemblies in this country from its first settlement, and in England from time immemorial.[1]

The case of Anderson v. Dunn and numerous English cases were cited as precedents showing conclusively:

That the Senate of the United States has power to punish for contempts of its authority in cases where it has jurisdiction; that every court, including the Senate and the House of Representatives, is the sole judge of its own contempts and that in the case of a commitment for contempt for such a case no other court can have a right to inquire directly into the correctness or propriety of the commitment, or to discharge the prisoner on habeas corpus, and that the warrant of commitment need not set forth the particular facts which constitute the alleged contempt.[2]

In order to strengthen its decision the court added that

we all think it does sufficiently appear in the return that the Senate were, at that time, engaged in a matter within their jurisdiction, to wit, an inquiry whether any person and who, had violated the rule of the Senate which requires that all treaties laid before them should be kept secret until the Senate should take off the injunction of secrecy.[3]

With reference to the ancillary questions mentioned above, the court answered affirmatively and concluded the case by stating that it was of unanimous opinion that the Senate had power, when acting in a case within its jurisdiction, to punish all contempts of its authority, and that the prisoner, having

[1] *Ex parte* Nugent, 18 Fed. Cas. No. 10375, p. 472 (1848).

[2] *Ibid.*, p. 481.

[3] *Ibid.*, p. 481.

been committed by the Senate for such contempt and being still held and detained for that cause by their officer, this court has, upon the habeas corpus, no jurisdiction to inquire further into the cause of commitment and must remand the prisoner.[1]

It is obvious that the reasoning in this case follows closely that of Anderson v. Dunn, and the adjudication of a House of Congress was held sufficient to establish the fact of contempt. However, the inclination of the court to examine into the jurisdiction of the Senate in this case is clear and foreshadows the later decisions of the courts as to their rights to review the jurisdiction of Congress in cases of contempt, by virtue of habeas corpus proceedings.

During the course of the investigation made by the Wilson Committee of the House into the Credit Mobilier frauds in 1873, Joseph B. Stewart, a witness summoned by the committee, refused to answer certain questions. His refusal was voted a contempt of the House and he was imprisoned by its order until he answered the questions asked him by its committee or was released by its order.

He sued the Speaker, James G. Blaine, in an action of trespass for assault and false imprisonment,[2] claiming through his attorneys that the questions asked referred to privileged communications made to the plaintiff by his client, while the relation of lawyer and client existed, and that the House of Representatives had no authority under the Constitution to prosecute the inquiry upon which their committee was engaged when the said questions were asked. The court held the House of Representatives had power to commit for the alleged contempt and that when a party is found guilty of a contempt, the order of the House directing his commitment is a complete protection to the Speaker who orders him

[1] *Ex parte* Nugent, 18 Fed. Cas. No. 10375, p. 483 (1848).

[2] Stewart *v.* Blaine, 1 MacArthur 453 (D. of C.) (1874).

into custody of the Sergeant-at-Arms. The court considered Anderson v. Dunn directly in point.

Several cases decided in the lower courts of the District of Columbia held that they could review the proceedings of the House of Representatives or the Senate in cases of contempt,[1] before a decision was made on this point by the Supreme Court in Kilbourn v. Thompson.[2]

This decision was of far-reaching importance. After having been found guilty of contempt by the House, for refusing to answer certain questions asked him by a special select committee,[3] Kilbourn was confined in the common jail of the District of Columbia for a period of forty-five days. He was then released on habeas corpus proceedings by the Chief Justice of the District of Columbia. Upon his release he sued the Speaker of the House, the members of the Committee and the Sergeant-at-Arms for his forcible arrest and confinement. The Committee and the Sergeant-at-Arms answered the complaint of Kilbourn, whereupon he filed a demurrer which was overruled and judgment rendered for the defendants. He then sued out a writ of habeas corpus to the Supreme Court, and a decision was rendered by Mr. Justice Miller which held his imprisonment for contempt to have been illegal, and also released the members of the House from prosecution due to the constitutional clause, "and for any speech or debate in either House they shall not be questioned in any other place."[4] However, the cause as to the Sergeant-at-Arms was remanded for further proceedings. Eventually, a judgment was obtained by Kilbourn against the Sergeant-at-Arms for $20,000, which was paid by order of Congress with interest and costs of suit.[5]

[1] See *supra*, ch. iii, pp. 207, 225.

[2] Kilbourn *v.* Thompson, 103 U. S. 168.

[3] See *supra*, ch. iii, pp. 211, 225 for detailed description of facts.

[4] Federal Constitution, art. i, sec. vi.

[5] 23 Stat. at Large 467, MacArthu r and Mackay 416, 432.

The Court said in this case that the House might punish its own members for disorderly conduct, that it might compel the attendance of members, and either the House or the Senate might in impeachment proceedings punish a witness for refusing to testify.

Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as witness before either House, unless his testimony is required into a matter into which the House has jurisdiction to inquire and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.[1]

As to the proposition that the general power to punish for contempts exists as one necessary to enable either House to exercise successfully its function of legislation, the Court said, " We do not propose to decide in the present case." In considering Anderson v. Dunn [2] it was stated in the opinion that this case held:

There is in some cases a power in each House of Congress to punish for contempt, that this power is analogous to that exercised by courts of justice, that it being the well established doctrine that when it appears that a prisoner is held under the order of a court of general jurisdiction for a contempt of its authority, no other court will discharge the prisoner or make further inquiry into the cause of his commitment.[3]. . . But we do not concede that the Houses of Congress possess this general power of punishing for contempt. If they are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown, and we cannot give our assent to the principle that, by the mere act of asserting a person to be

[1] Kilbourn *v.* Thompson, 103 U. S. 190.

[2] See *supra*, ch. vi, pp. 342-345.

[3] 103 U. S. 197.

guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made.[1]

As to the particular inquiry undertaken by the House in this case, the Court said, in substance, that it was into a matter then pending before a court of competent jurisdiction and there was no inadequacy of power in the courts to give redress which could lawfully be supplied by any investigation or act of Congress. The subject matter of this investigation was judicial, not legislative, and there was no power in Congress or either House thereof, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and hence no authority to compel a witness to testify on the subject.

In commenting on the resolution adopted by the House, authorizing this investigation, the Court stated:

It contains no hint of any intention of final action by Congress on the subject. In all the argument of the case no suggestion is made of what the House of Representatives could have done in the way of remedying the wrong or securing the creditors of Jay Cooke and Company, or even the United States. Was it simply to be a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By "fruitless" we mean that it could result in no valid legislation on the subject to which the inquiry referred.[2]

The Court refused to see any weight in the argument that Congress possessed the general power to punish for contempt

[1] 103 U. S. 197.

[2] *Ibid.*, p. 195.

because of its inheritance of such power from England. Parliament had such power because it was once a high court of judicature, " which though divested by usage and by statute probably, of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority," [1] whereas this was not true of Congress which was a body of enumerated powers and had never been a court.

Summarizing then, this case held: (1) Congress does not have a general power to punish for contempt. (2) Congress does have the power to punish for contempt in those cases where it is given a judicial grant, such as in election disputes, impeachment trials and bribery of members. (3) The decision of Congress as to what constitutes a contempt is not conclusive on the courts and in this respect this decision overruled Anderson v. Dunn in so far as the latter held that the resolution of the House finding a person guilty of contempt was conclusive evidence of the fact.

Probably the most important point brought out in the case is that the courts will examine into the merits of each case of contempt brought before them and in the case of Congress will undoubtedly declare contempt proceedings illegal where the subject of the investigation exceeds its jurisdiction. From this case it would appear that Congress cannot use the power of compulsion in investigations where no remedial legislation can result or where it has not received a judicial grant in the Constitution. The question arises, could Congress punish for contempt in making an investigation where remedial legislation could result? This question was left open by the Court, although such a doctrine was frowned upon in the dictum of the case.

[1] 103 U. S. 189.

On the other hand the Court mentioned the fact that the resolution calling for the investigation made no hint of any intention of final action by Congress on the subject. Hence it appeared that it was to be a " fruitless " investigation which the court defined as one in which no valid legislation could result on the subject to which the inquiry referred. From this it would seem that the Court might have been more lenient in restricting the power of the House, if some hint of final intention had been contained in the resolution ordering the investigation. At any rate, the Court certainly ignored the possibility of calling this investigation a legislative one, although it was no different from scores of previous congressional investigations.

The case affirms the right of the citizen to be protected in his private affairs, papers, effects from the searching scrutiny of a Congressional investigation. It is clear that there are limits to the " common law " power of Congress to investigate. They will likely appear whenever either House of Congress attempts to use its power to punish for contempts in cases where there is the combination of a sweeping inquisition into the private affairs of a person, coupled with a vague purpose in making the investigation or where the investigation cannot clearly result in remedial legislation. Without question, this decision made inroads on the common-law power of Congress to punish for contempts in that it showed there were constitutional limitations on this power, and that the courts could review its exercise, a right which had been consistently denied in Congress. The fact that this decision held that the courts could inquire by habeas corpus proceedings into the question of the authority of the Houses of Congress to punish contumacious witnesses for contempt in investigative proceedings meant that as soon as such a witness had been detained in custody by warrant of the House concerned, he could petition a Federal Court for

a writ of habeas corpus and thus obstruct the course of the investigation. The fact that after this decision was made, both Houses tended to rely more and more on the Statutes for punishment of contumacious witnesses rather than upon their common-law power to punish by imprisonment to the end of the session proves this. The effect of this decision, moreover, is clearly brought out in Senator Walsh's statements made in the debate on the recent Senate investigation of oil leases.[1] It is also reflected in the trouble the Senate had with Mal Daugherty, for in his case the Senate issued a warrant for his arrest and subsequent appearance before the bar to answer for his contempt, but he promptly secured a writ of habeas corpus and secured his freedom on bail, thus seriously checking the effectiveness of the investigation.[2] It should be noted in this connection that the delay of the courts in deciding these cases of contempt referred to them by the Houses of Congress for indictment and prosecution has in the last few years prompted the Senate in its proceedings against contumacious witnesses to revert to the use of its common-law power to punish in order to supplement its power under the statutes. By thus making the penalties cumulative for refusal to answer the questions of its committees, the Senate made certain that a contumacious witness would be punished for his contumacy, while at the same time there was also the possibility that the witness might later decide to give the required testimony. This he would not do if the facts of his contumacy were simply reported to the courts for due punishment. The recent case of Robert Stewart illustrates the possibilities in this double-barrelled method of punishment.[3]

[1] See *supra*, ch. iv, pp. 291, 292.

[2] See *infra*, ch. vi, pp. 366, 367.

[3] In the recent renewal of the Senate's investigation into oil leases, the Senate Committee on Public Lands was defied by Robert

The question of the payment of fees to witnesses came before the United States Court of Claims in Lilley v. U. S.[1] Lilley was summoned before the Judiciary Committee of the House of Representatives as a witness in an investigation, which had been ordered by resolution, of the charge against Charles Hay. Lilley attended and testified before the Committee on three of the eight days in which it was engaged in

Stewart of the Standard Oil Company of Indiana. He refused to answer certain questions of the Committee. He was arrested under authority of a Senate Resolution ordering the President of the Senate to issue his warrant to the Sergeant at Arms, authorizing him to bring Stewart before the bar of the Senate. He promptly sued out a writ of habeas corpus, which automatically stayed the program of the Senate to arraign him at its bar, and thus held up further investigation so far as he was concerned. A motion in the Senate proposing to certify Stewart's contempt to the district attorney as provided for in the statutes was commented on by Senator Caraway of Arkansas as follows: "I understand that a motion to certify this matter to the district attorney has been made. Sinclair is out and they have been pretending to try a contempt case before Justice Siddons since the memory of man runneth not to the contrary. It seems to me that anything that is certified down there, we might as well say is merely off our hands and that the parties are in no danger of being punished." Senator Walsh (Montana) replied, "I desire to say that it is regrettable that these interminable delays occur, but we know of no way to avoid them." Senator Caraway then said that he thought that these delays had become a national scandal. However, Stewart's contempt was certified to the district attorney. He was subsequently indicted for his misdemeanor in refusing to answer the questions of the Committee and his case is now waiting trial (May 1, 1928). In the meantime, the court decided on review of the facts of his contumacy in habeas corpus proceedings that he should have answered the questions and he was remanded to the custody of the Sergeant at Arms of the Senate. Rather than carry this decision to the higher courts or be immediately imprisoned by the Senate, he appeared before the Senate Committee and answered the questions of the Committee. This course of action purged him of his contempt of the Senate, but it cannot free him from his liability for punishment under the statutes and it is hard to see how he can escape a fine and jail sentence, unless a jury decides the questions were irrelevant. *New York Times*, February 5, 1928.

[1] Lilley *v.* U. S., 14 Ct. of Claims 539 (1878).

the investigation, and he was frequently about the Capitol, and occasionally inquired of members when he was to be discharged; but as the Committee contemplated calling him again, he was not formally discharged until the end of 128 days. By a resolution of the House of Representatives witnesses before committees are allowed fees at a fixed per-diem rate.

Fees of witnesses before committees were fixed by the following resolution of the House, passed May 31, 1872: Resolved,

> That the rule for paying witnesses summoned to appear before this House or any of its committees shall be as follows, namely: For each day a witness shall attend, the sum of $4.00, for each mile he shall travel in coming to and going from the place of examination, the sum of 5 cents each way; but nothing shall be paid for traveling when the witness has been summoned at the place of trial.[1]

The claimant presented to the Committee a claim for per-diem fees during the whole period from the time he was summoned until he was discharged. The claim was rejected and there was issued to him a certificate for three days only at $4.00 per day, or $12.00 in all. He brought action to recover $512 for 128 days' attendance which he alleged was due him from the United States upon an implied contract.

The Court held: "Either House of Congress has the undoubted right to require the personal attendance before its committees, as a witness or otherwise, of any citizen of the country, to be paid or not, according to its own will and pleasure. Attendance in such case is not by agreement, but is the voluntary or involuntary submission of a subject to a power of the government which must be obeyed and which cannot be resisted. There is no implied agreement to pay

[1] See *infra*, Appendix B.

fees or other compensation to persons thus required to give their time to the public service. Fees do not accrue in such case as upon contract. It is true that they are usually paid, but it is under and by virtue of the rules and practice of the Senate or House or by special acts authorizing the same. No statutes provide for the payment of witnesses before committees of either House of Congress. It is understood to be the practice of the House, sanctioned by long usage, to pay out of its contingent fund the fees of witnesses before standing committees, but not those summoned by special committees. The latter are paid only in case there is a special appropriation for the expenses of such committee." [1]

The court concluded by stating that it had no jurisdiction to enforce the rules and orders of the Houses of Congress, and it would be an unwarranted interference with the functions of their committees for "this court to review and revise their allowance of witness fees, or to enforce payment for the same out of the public treasury in a manner not in accordance with the rules and practice of the House."

The Act of 1857 and its subsequent amendment in 1862 and revision in 1873 came directly before the Supreme Court of the United States for review in 1897.[2] In this year the Senate adopted a resolution and a preamble appointing a special committee and clothing it with full power of investigation into certain charges made in designated newspapers, that members of the Senate were yielding to corrupt influences in the consideration of certain legislation dealing with the tariff. In the course of the investigation, Chapman, a member of a firm of stockbrokers in the city of New York, dealing in the stock of the American Sugar Refining Company, appeared as a witness, and was asked whether the firm of which the witness was a member had bought or sold

[1] Lilley *v.* U. S., 14 Ct. of Claims 540.

[2] *In re* Chapman, 166 U. S. 661 (1897).

what were known as sugar stocks during the month of February 1894 in the interest of any United States Senator, had the said firm during the month of April and May done so, was the said firm at the time carrying any sugar stock for the benefit of or in the interest, directly or indirectly, of any United States Senator?[1]

Chapman refused to answer the questions propounded, whereupon, as provided in Section 102 of the Revised Statutes making such refusal criminal,[2] he was put in jail by the Marshal of the United States for the District of Columbia. He sued out a writ of habeas corpus, claiming among other things that the statute under which he was prosecuted was unconstitutional, because the subject of the refusal was exclusively cognizable by the Senate, hence this was a wrongful delegation by the Senate of its authority and because, to subject him to double jeopardy, that is, leave him after punishment under the statute to be dealt with by the Senate as for contempt, was contrary to the Fifth Amendment.

In its decision the Court affirmed the right of Congress to punish for contempt in cases to which its power properly extended under the expressed terms of the Constitution and held that the Senate had the right to conduct the investigation under its power to expel members, and could, therefore, have punished the recalcitrant witnesses for contempt, but also Congress might make such a refusal to testify a misdemeanor. After demonstrating the want of merit in the argument as to delegation of authority, the proposition was held to be unsound and the contention as to double jeopardy was also adversely disposed of on the ground of the distinction between the implied right to punish for contempt and the authority to provide by statute for punishment for

[1] *In re* Chapman, 166 U. S. 663.

[2] See *infra*, Appendix B.

wrongful acts and to prosecute under the same for a failure to testify were *diverso intuito* and capable of standing together, moreover they were susceptible of being separately exercised. In other words, the Court held that the legislation contained in Sections 102 and 104 of the Revised Statutes was originally enacted

more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony, and when reasonably construed, is not open to the objection that it conflicts with the provisions of the Constitution, and while Congress cannot divest itself or either of its Houses of the inherent power to punish for contempt, it may provide that contumacy in a witness called to testify in a matter properly under consideration by either House and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States.[1]

In reconciling this case with Kilbourn v. Thompson, the Court said:

The case at bar is wholly different. Specific charges publicly made against Senators had been brought to the attention of the Senate and it had determined that investigation was necessary. The subject matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen, they did not seek to ascertain any facts as to the conduct, methods, extent or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by Senators to buy or sell for them any of that stock, whose market price might be affected by the Senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this

[1] *In re* Chapman, 166 U. S. 772.

sort are within the power of either of the two Houses they cannot be defeated on purely sentimental grounds.[1]

This case is very important in that it fully settled the point that Congress could exercise its common-law or implied power to punish for contempt to the end of the session of the House, even though it had enacted a statute providing for punishment of such contempt as a misdemeanor. However, as we have shown, the mere fact that the courts can review the cases of contumacious witnesses held in custody by Congress, has reduced the effectiveness of this common-law form of punishment.[2]

In the 62d Congress, the House of Representatives adopted a resolution authorizing the members of the Committee on Banking and Currency to investigate and make a report as to the financial affairs and activities of national banks, interstate corporations, and groups of financiers as a basis for remedial and other legislative purposes. To that end the Committee was authorized to send for persons and papers and to swear witnesses.[3]

Henry, one of the witnesses before the Committee, testified that he was a member of the firm of Salamon and Company, bankers in New York City, who were accustomed to form syndicates for the acquisition and sale of stocks. He was asked to give the names of those composing certain of these syndicates, but he refused to answer, claiming he had the right under the Constitution to refuse to answer, and that he would consider it dishonorable to reveal the names of his customers.

The Committee ordered the fact of his refusal to answer to be reported to the House for action. After discussion, the House decided that the facts should be laid before the

[1] *In re* Chapman, 166 U. S. 669.

[2] See discussion, *supra*, p. 355.

[3] Henry *v.* Henkel, 235 U. S. 219, 224.

Grand Jury of the District of Columbia. They returned an indictment against him, charging him with refusing to answer questions propounded by the Committee. A warrant issued and Henry was arrested in New York City, and when taken before the Commissioner, demanded an examination. After argument, the Commissioner ordered Henry to be held in custody until the District Judge could issue a warrant for his removal to the District of Columbia under the provisions of Sec. 101-104 Revised Statutes.

Thereupon Henry applied to the District Judge for a writ of habeas corpus, which was discharged after argument. An appeal was taken to the Supreme Court of the United States. Here his attorneys argued that, in view of the provisions of the Fourth Amendment to the Constitution, neither House can compel a citizen to disclose his private affairs as a basis for legislation, particularly where, as in the present case, the witness was not contumacious but had fully and freely answered all material questions and had only refused to give the names of certain bank officials when the names themselves could not possibly be of benefit in shaping legislation.

In the decision [1] the Court refused to answer the controverted questions brought out in the argument but contented itself with saying that the hearing on habeas corpus is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court. Hence the Court said the only question was that, "on application for habeas corpus, the hearing is confined to the simple question of jurisdiction, and even that will not be decided in every case."

So Henry was not allowed to anticipate the regular course of proceedings by alleging a want of jurisdiction and demanding a ruling thereon in habeas corpus proceedings. Henry died before the case came to trial in the lower court.

That refusal to testify before a Congressional committee,

[1] Henry *v.* Henkel, 235 U. S. 219, 224.

which is investigating for the purpose of framing legislation, may be punished as a contempt is held by a carefully-worded dictum in Marshall v. Gordon.[1] Marshall, while United States Attorney for the Southern District of New York, conducted a grand jury investigation which led to the indictment of a member of the House of Representatives. Acting on charges of misfeasance and nonfeasance made by the member against Marshall in part before the indictment and renewed afterward, the House by resolution directed its Judiciary Committee to make inquiry and report concerning Marshall's liability to impeachment.[2] Such inquiry being in progress through a sub-committee, appellant addressed to the sub-committee's chairman and gave to the press a letter, charging the sub-committee with an endeavor to probe into and frustrate the action of the grand jury and couched in terms calculated to arouse the indignation of the members of that committee and those of the House generally. Thereafter, the appellant was arrested in New York by the Sergeant-at-Arms pursuant to a resolution of the House whereby the letter was characterized as defamatory and insulting and as tending to bring that body into public contempt and ridicule, and whereby appellant in writing and publishing such letter was adjudged to be in contempt of the House in violating its privileges, honor and dignity. He applied for habeas corpus, which was denied in the District Court. He then appealed to the United States Supreme Court.

The Court in its decision considered the main question to be as follows:

> Whether the House had power under the Constitution to deal with the conduct of the District Attorney in writing the letter as a contempt of its authority and to inflict punishment upon the writer for such contempt as a matter of legislative power, that

[1] Marshall *v.* Gordon, 243 U. S. 521 (1917).

[2] *Ibid.*, pp. 531, 532.

is, without subjecting him to the statutory modes of trial provided for in criminal offenses protected by the limitations and safeguards which the Constitution imposes as to such subjects.[1]

The Court in its dictum admitted that the House had implied power to deal directly with contempt so far as is necessary to preserve and exercise the legislative authority expressly granted, but in defining this power it stated that, since it was a power of self-preservation, a means and not an end, the power does not extend to infliction of punishment as such; it is a power to prevent acts which in and of themselves, inherently, prevent or obstruct the discharge of legislative duty and to compel the doing of those things which are essential to the performance of the legislative function.[2] The instances of punishment which the Court approved were "either physical obstructions of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel."[3] It was further declared that this power, even when applied to subjects which justify its exercise, "is limited to imprisonment, and such imprisonment may not extend beyond the session of the body in which the contempt occurred."[4]

The point was made in the argument of the case that this was an impeachment proceeding and hence the House could punish the act of the appellant within the reasoning estab-

[1] Marshall *v.* Gordon, 243 U. S. 532, 533.

[2] *Ibid.*, pp. 541, 542.

[3] *Ibid.*, p. 543.

[4] *Ibid.*, p. 542.

lished in Kilbourn v. Thompson.[1] However, the Court maintained that whether they were impeachment proceedings or not, the House was without power by its own action, as distinct from such action as might be taken under criminal laws, to arrest or punish for such acts as were committed by the appellant; in other words, the power is the same in quantity and quality whether exerted on behalf of the impeachment powers or of the others to which it is ancillary.

The position of the Court in this particular case was, then, that the writing and publishing of the letter complained of as a libel by the committee was not an act which could be punished by the committee of the House as a contempt, because this act did not obstruct or interfere with the duties of the legislature, nor was its punishment essential to the self-preservation of the legislature. The contempt complained of was extrinsic to the discharge of the legislative duty and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee upon the subject. As the Court said, "These considerations plainly serve to mark the broad boundary line which separate the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment of wrongful acts." [2]

The decision in this case certainly indicates that the Houses of Congress have the implied power to punish for contempt as an adjunct to their power to legislate. It is also clear from the dictum in this case that this power is really not a punitive power as such, it is rather a coercive power to prevent acts which obstruct legislative proceedings or to compel the doing of those things which are essential to the perform-

[1] See *supra*, ch. vi, p. 351.

[2] Marshall *v.* Gordon, 243 U. S. 546.

ance of the legislative function. Finally this opinion of the court shows that the power of the Houses of Congress to punish offenders of their privileges is limited to those acts which constitute a direct interference with their duties, and that it would probably be better policy for such offenders to be "subject to the statutory modes of trial provided for in criminal offenses protected by the limitations and safeguards which the Constitution imposes as to such subjects." [1] This case clearly illustrates the protection the courts will accord to victims of congressional passion in contempt proceedings.

Both Houses of Congress initiated an orgy of investigations as a result of the Harding régime.[2] In fact so many investigations were called for that it became popular to ridicule the proceedings. The character of some of the witnesses summoned in these inquiries and the irrelevant nature of much of the testimony offered, certainly gave room for criticism. However there was no doubt of the existence of delinquency in several of the administrative departments and the Houses of Congress, especially the Senate, conducted sweeping inquisitions into the conduct of these departments.

During the course of these investigations, several witnesses refused to testify, among them being M. S. Daugherty and Harry Sinclair. The Senate had ordered by its resolutions a special committee of five Senators to investigate corruption in the Attorney General's Department.[3] During the investigation, the committee subpœnaed Daugherty, a brother of the ex-Attorney-General, to appear before them and bring with him certain papers. He refused to appear, whereupon the committee issued a second subpœna simply

[1] Marshall *v.* Gordon, 243 U. S. 548.

[2] See Galloway, *The Investigative Function of Congress*, in 21 *Am. Pol. Sc. Rev.*, p. 63.

[3] 68th Cong., 1st sess., *Record*, pp. 3299, 3409-3410, 3548, 4126 (March, 1924).

asking him to appear and making no mention of papers. He again refused and so the committee reported his refusal to the Senate.[1]

After some debate the Senate passed a resolution ordering the President *pro tempore* to issue his warrant commanding the Sergeant-at-Arms to take Daugherty and bring him before the bar of the Senate.[2] The warrant was indorsed to the Deputy Sergeant-at-Arms, McGrain, who proceeded to carry out its instructions. Daugherty then petitioned the Federal Court, Southern District of Ohio, for a writ of habeas corpus, which was issued and McGrain made due return setting forth the warrant and the cause for detention. The question then arose, was the action of the Senate in causing the warrant to be issued valid? Its validity depended upon whether that body had exceeded its powers in initiating the investigation.[3]

In reviewing the proceedings Judge Cochrane held Daugherty's detention illegal because the subject matter of the investigation was clearly outside its jurisdiction and hence the investigation represented an unconstitutional exercise of power by the Senate. The lower court held that this was a "judicial" investigation,

> for it is proposing to determine the guilt of the Attorney General of the shortcomings and wrongdoings set forth in the resolutions. It is to hear, adjudge and condemn. In so doing it is exercising the judicial function, which neither House can so do unless such power is expressly conferred by the Constitution. To permit the exercise of such power by either House would be to deny the separation of the powers of Government.[4]

[1] 68th Cong., 1st sess., *Sen. Rep. No. 475.*

[2] 68th Cong., 1st sess., *Record*, pp. 7215-7217.

[3] *Ex parte* Daugherty, 299 Fed. 620 (1924).

[4] *Ibid.*, p. 640.

In other words, the Senate was, in substance, trying and condemning the Attorney General, not investigating his office. The fact that the second resolution providing for the issue of the warrant stated that, " Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary, in order that the Committee may properly execute the functions imposed upon it, and obtain information necessary as a basis for such legislation and other action as the Senate may deem necessary . . . ," [1] the court held was of no significance in interpreting the real purpose of the investigation. Moreover it called attention to the fact that the first resolution of the Senate authorizing the investigation and creating the Committee did not mention a legislative purpose but emphasized the wrongdoings of H. M. Daugherty, the Attorney General. It was, so to speak, a purely personal investigation, according to the court for the " extreme personal cast " of the Senate Resolution was obvious.

As to whether the Senate had the power to make an investigation as auxiliary to the exercise of the legislative function, the court answered by reviewing two well-known State cases, McDonald *v.* Keeler [2] and *Ex parte* Parker,[3] which supported such investigations. But these cases were differentiated from the present one on the score that in the States the entire legislative power is vested in the legislature by their respective Constitutions, except thereby denied. However in the case of Congress, said the court, such power is limited by the Tenth Amendment and Article I, Section I of the Federal Constitution.[4] Calling attention to the fact that the Supreme Court had never said anything favoring the

[1] See *supra*, ch. v, p. 367n.

[2] People *ex rel.* McDonald *v.* Keeler, 99 N. Y. 463 (1885).

[3] *Ex parte* Parker, 74 S. C. 466 (1906).

[4] *Ex parte* Daugherty, 299 Fed. 635, 636.

existence of such power, the court added further that neither House of Congress seems to have exercised this power, namely, of compelling an outsider to testify or produce documents in aid of legislation. However, the court did not have to decide this question in order to render its opinion, and was content with the remark that it seriously doubted the existence of such power.

In lining up this case with Kilbourn *v.* Thompson, the court said that this was even a stronger case, for here the Senate is not only exercising the judicial function, power to do which is not conferred by the Constitution, but power to do which is impliedly negatived by the Constitution, in the provision conferring the sole power of impeachment on the House of Representatives and limiting the Senate's connection with such proceedings to trying them.

As to other cases involving similar questions, it was said of *In re* Chapman [1] that it dealt with an investigation directly concerning the members of the House, and the Federal Constitution expressly confers on each branch of Congress the power to punish its members, hence this was a rightful exercise of authority. In referring to Anderson *v.* Dunn [2] the court stated that decision held that the House of Representatives has power to punish an outsider for contempt. It also stands for the position that the Senate has that power. However, the court observed that the decision shed no light whatever on the question as to the circumstances under which the duty may be owed by an outsider to either branch of Congress to give testimony or produce documents. In other words, the particular in which Anderson had misbehaved not appearing from the plea, and the House having power to punish in some particular, it was to be presumed that it was for misbehavior in such particular that he had been punished

[1] *In re* Chapman, 166 U. S. 661.

[2] Anderson *v.* Dunn, 6 Wheaton 204.

for contempt. "But if this decision stands for the position that the judgment of the House is final and conclusive on the courts in contempt cases, it was clearly overruled to that extent by Kilbourne *v.* Thompson." [1] This latter case, the court said, held that the investigation of the House was in its nature judicial and since it did not come within one of the instances in which judicial power was expressly conferred, it was unconstitutional.

It is obvious that the decision in this case turned on the question of the power of the Senate to investigate the administrative departments of the government. The court was much concerned as to whether the investigation was judicial in character or not. This investigation was a judicial one, the court thought, for the extreme personal character of the accusations made against Daugherty made it appear that the effect of the proceedings was to put him on trial. If these were impeachment proceedings such an investigation would have been legal if conducted by the House. But this was a Senate investigation which made the proceedings doubly vicious. From this opinion it would appear that the Senate is barred from investigating the administrative departments if such investigations have too personal a cast, a question which will be decided by the courts.

The holding of the court that the investigation was unconstitutional because it was a judicial one, would seem to be indefensible, in the light of previous Congressional practice. The exercise by Congress of inquisitorial power in such a case simply represents the use of judicial power in aid of its legislative functions. The court, by calling this a "judicial investigation" because of the extreme personal cast of the resolutions of the Senate, assumed an arbitrary position, for how could it know what the Senate might do as a result of the investigation? It might propose new laws, suggest a

[1] *Ex parte* Daugherty, 299 Fed. 630.

change in the structure of the Attorney General's Department, and most important of all, expose possible inefficiency and fraud to the public gaze. There was nothing in this investigation which precluded such possibility, and as already noted, the Senate had actually declared in its resolution approving the issue of the warrant to arrest Daugherty, that the investigation was " for legislative and other purposes." Moreover, how could it be possible for a Congressional committee to investigate an administrative department of the Federal Government without investigating the efficiency or inefficiency of the officials involved, even to the extent of " hearing, adjudging and condemning "? Certainly the presumption of validity ought to attach to the resolutions of the Senate authorizing such an investigation. The weakness of the court's position is clearly reflected in its opinion that it was not the subject matter of the investigation which determined its judicial character, but the inherent character of the investigation. The character of this investigation was no different from that of scores of investigations which the Senate had made previously in its history into the efficiency of the administrative departments.

The support which Justice Cochrane got from Kilbourn *v.* Thompson ought not to be overemphasized. As has been shown in our analysis of this case, it was well known that a Federal Court had already settled the issues involved in the bankruptcy proceedings of Jay Cooke and Company and there was some reason for calling the investigation a fruitless one; although, in this case, the court simply failed to see that the particular funds in question represented a deposit by the Secretary of the Navy in the London branch of Jay Cooke and Co. and hence the particular bankruptcy was of consequence in relation to the security demanded for all government deposits. Both these decisions ignored the force of numerous previous investigations. The demand of the

courts in these two cases was for a clear definition of the purposes of such investigations and certain guarantee that the results would be legislative in character. But how could a House of Congress pass on the desirability of legislation before it knew the facts in the case?

Daugherty's case involved an investigation of an executive department, the inefficiency of which was nationally suspected. There can be no doubt that if public opinion had decided the issue in this case, the investigation would have been held legal. And after all, the fundamental question in these investigations is: Is the public need for information great enough to warrant the interference with the individual right of protection from the inconvenience, deprivation of private property and interference with personal liberty occasioned by the demands of the government to testify? The lower court in Daugherty's case mentioned, in its dicta, that the information a person knows and his private papers are as much his property as a horse which he might own, and implied that he was unconstitutionally deprived of his property by this investigation.

The court is right in believing that Congress should not be turned into a court for the trial of crimes and misdemeanors even when committed by public officials, but, as stated before, it is certainly difficult to draw the line between what constitutes putting an official on trial for his personal misdoings and simply investigating his office with a view to examining the efficiency of its administration. There is no doubt that this decision was entirely out of line with Congressional precedent. Justice Cochrane was plainly unaware of the long list of Congressional investigations similar to the one he reviewed in this instance, in which the power to compel testimony and punish for contempt had been exercised.

The effect of this decision was to check the Senate's power

of investigation and leave undecided the question which the Federal Courts had steadfastly refused to decide, namely, do the Houses of Congress have power to compel testimony and punish for contempt in investigations in aid of the exercise of whatever legislative power is granted by the Constitution?

Further proceedings of the Senate in this case were held up by this decision. However McGrain, the Deputy Sergeant-at-Arms, who served the warrant on Daugherty, prayed and was allowed a direct appeal to the Supreme Court of the United States, which had the case for consideration over two years. Before a decision was made, the Senate was balked by several other witnesses who refused to testify in the recent Senate investigations into expenditures in the Illinois and Pennsylvania election campaigns. Among these contumacious witnesses were Samuel Insull, Robert Crowe, Daniel Schuyler and Thomas W. Cunningham.[1] Hence it is obvious that the decisions of the Supreme Court in McGrain *v.* Daugherty [2] would be of extreme importance in that it would have to decide this long-debated question, whether the Senate or the House of Representatives can compel, through its own process, a private individual to appear before it or one of its committees and give testimony needed to exercise efficiently a legislative function belonging to it under the Constitution? The opinion of the Court was reported on January 18, 1927.

The Court said in rendering its opinion that it had given the case "earnest and prolonged consideration because the principal questions involved are of unusual importance and delicacy." [3] The principal question involved in the case was held by the Court to be the one mentioned above. The

[1] See *Senate Res. No. 195*, 69th Cong., 1st sess., *Record*, pp. 9677, 9678, also *Record*, pp. 11,797 (1926).

[2] McGrain *v.* Daugherty, 273 U. S. 135 (1927).

[3] *Ibid.*, p. 154.

second major question, it said, was "whether it sufficiently appears that the proper process was being employed in this instance to obtain testimony for that purpose?"

Minor questions involved in the case were settled first. The witness had challenged the authority of the deputy to execute the warrant on two grounds; that there was no provision of law for a deputy, and even if there was, a deputy could not execute the warrant because it was addressed simply to the Sergeant-at-Arms.

The Court held that neither ground was tenable, for the Senate had adopted in 1889 and had retained ever since, a standing order declaring that the Sergeant-at-Arms may appoint deputies "to serve process or perform other duties in his stead and they shall be officers of the Senate." Moreover the Court pointed out that Congress has sanctioned the practice under it by recognizing the deputies as officers of the Senate by fixing their compensation and by making appropriations to pay them.

The fact that the warrant was addressed simply to the Sergeant-at-Arms was held to be of no special significance, for the Court showed that the standing order and the resolution under which the warrant was issued plainly contemplated that he was to be free to execute the warrant in person, or to direct a deputy to execute it.

Daugherty also contended that the provision in the Fourth Amendment to the Constitution declaring "no warrants shall be issued but upon probable cause supported by oath or affirmation," voided the warrant because the report of the committee on which it was based was unsworn.

The Court in answer to this argument pointed out that the committee was a part of the Senate and its members were acting under their oath of office as Senators. The matters reported pertained to their proceedings and were within their knowledge. Moreover in legislative practice committee re-

ports are regarded as made under the sanction of the oath of office of its members, and where the matters reported are within the committee's knowledge and constitute probable cause for attachment, are acted on and given effect without requiring that they be supported by further oath or affirmation. The Court concluded that the legislative practice coupled with the judicial practice showed that the report of the committee was sufficiently supported by oath to satisfy the constitutional requirement.

The witness further claimed that the warrant demanded that he appear before the Senate and give testimony, whereas he had neither been summoned to appear before the Senate, nor had refused to do so. The Court answered by saying that the subpœna had already been issued by the committee and that it was to be treated as if issued by the Senate.

In summoning Daugherty before them the committee had issued two subpœnæ, the first one demanding him to appear and bring with him certain papers. Upon his refusal the committee issued a second subpœna ordering him to appear and testify. This he had already refused to do. The Court in approaching the principal questions involved, stated that it was not now concerned with the right of the Senate to propound specific questions to the witness, as no questions had been put to him. By considering solely the second subpœna, this made the question, does the Senate have the power to interrogate the witness, even if the questions propounded be pertinent and otherwise legitimate?

In deciding this important question the Court admitted that the Constitution is silent on this point and that it remained to decide whether this power was so far incidental to the legislative function as to be implied. Here the Court pointed to the long list of precedents showing the exercise of this power by Parliament and the colonial and state legislatures, and stated that all these bodies considered the power to

secure needed information by such means to have been treated for a long time as an attribute of the power to legislate. This view the Court said had prevailed and had been carried into effect in both Houses of Congress and in most of the state legislatures.

After referring to Congressional precedents and statutes, the Court then considered the cases previously decided by the same body bearing on this power and arrived at the conclusion that these cases stand for the proposition that both Houses of Congress in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but also such auxiliary powers as are necessary and appropriate to make the express powers effective, and that "neither House is invested with general powers to inquire into private affairs and compel disclosures but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is correctly applied."

The Court faced the principal question fairly and decided unanimously in favor of the power of the Senate or the House, they being on an equal plane in this respect, to compel private persons to appear before their committees and answer pertinent questions in aid of their legislative functions. To strengthen their position the Court added that the long-established practice of the Houses in this respect fell nothing short of a practical construction long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of these provisions, if otherwise doubtful. Moreover the Court showed that the practical exigencies of the case warrants the use of this power, for

> a legislative body cannot legislate wisely or effectively in the absence of information respecting the condition which the legislation is intended to affect or change, and where the legislative

body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it. Experience has taught that mere requests for information are often unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion is necessary to obtain what is needed.[1]

In other words, the Court believed "that the constitutional provisions which commit the legislative function to the two Houses are intended to include this attribute to the end that the function may be effectively exercised." [2]

As to the possibility of abuse in the exercise of this power, the Court pointed to Kilbourn *v.* Thompson [3] and Marshall *v.* Gordon [4] as showing that a witness may rightfully refuse to answer where the bounds of power are exceeded or the questions are not pertinent to the matter under inquiry.

The second major question settled by this decision was, did it sufficiently appear that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function. It will be recalled that the lower court in deciding this point held that the purpose of the investigation was to take action other than legislation, that the extreme personal cast of the resolutions and the fact that the Senate did not state that legislative action was to be taken until after the action had been challenged proved this, and also when it did state that such action would be taken in its second resolution it coupled with it the avowal that other "action was contemplated also." Therefore this court decided that the investigation was unconstitutional as representing a usurpation of judicial power, in that such power

[1] McGrain *v.* Daugherty, 273 U. S. 175.

[2] *Ibid.*, p. 174.

[3] *Ibid.*, p. 176.

[4] *Ibid.*, p. 176.

as used in these proceedings was not conferred on the Senate by the Constitution.

The Supreme Court took a more logical view of this question when it stated that "the investigation was of the administration of the Attorney General's Department, whether its functions were being properly discharged. Hence this was plainly a subject upon which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." [1] That this is true can be clearly seen, the Court said, from the fact that the Attorney General's Department and the powers and duties of the Attorney General are all subject to regulation by Congressional legislation.

The Court added that the only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and the "subject matter was such that the presumption should be indulged in that this was the real object. An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable." [2] The Court in arriving at this conclusion leaned heavily on the decision in McDonald *v.* Keeler (99 N. Y. 463), where it was said, "We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume that the contrary was intended."

Generally, the power of the Senate and House of Representatives to make investigations is immeasurably strengthened by this decision. As we have pointed out, the question of the power of the Houses of Congress to punish for contempt in inquiries in aid of legislation has been disputed ever since the organization of the Federal Government. This

[1] McGrain *v.* Daugherty, 273 U. S. 177.

[2] *Ibid.*, p. 178.

decision clears up the dispute and sanctions the long-continued practice of Congress in this respect.

Of course, witnesses may still refuse to answer the questions of an investigating committee on the ground that the questions are not relevant to the inquiry, or such refusal may be based on the ground that the investigation is not one for legislative purposes. However it is obvious from this decision that the Supreme Court will construe an investigation of either House to be a legislative one if possible, which means that most Congressional investigations will be presumptively legislative, and hence constitutional, unless there is a clear statement and avowal to the contrary.[1]

The effect of this decision can already be seen, for a jail sentence of three months and a fine of $500 has been imposed upon Harry F. Sinclair for his contempt of the United States Senate in refusing to answer certain questions in the Senate Teapot Dome investigation when he was summoned for the sixth time on March 22, 1924. The questions which Mr. Sinclair refused to answer and which formed the basis of the trial were propounded by Senator Walsh of Montana. Senator Walsh had asked Mr. Sinclair to tell the Committee about a contract alleged to have been made by him with a Denver publisher (Mr. Bonfils) touching the Teapot Dome. He was also asked to tell about an alleged agreement between himself and the then Secretary Fall under which a Chicago publisher (Mr. Shaffer) was said to have been promised a portion of certain territory by a lease secured from the Mammoth Oil Company. Mr. Walsh also asked the witness to state where and when he met Secretary Fall during November and December, 1923.

Sinclair had refused also to answer a question propounded

[1] As Professor McBain has so clearly pointed out, this decision gives to the Houses of Congress "the power to investigate almost anything they choose." McBain, H. L. in *New York Times*, March 11, 1928.

by former Senator Adams of Colorado, as to whether the witness had said in an earlier hearing that neither he nor any of his companies had given or loaned anything to Secretary Fall. These were four of the ten questions deemed pertinent to the accusation of contempt.

The only questions submitted to the jury were: (1) Was the accused summoned before the Committee? (2) Did he respond? (3) Was he sworn? (4) Were the questions asked? (5) Did Sinclair refuse to answer?

All these questions were answered by the jury in the affirmative. The verdict was guilty. In imposing sentence Justice Hitz said the ruling of the Supreme Court in the McGrain *v.* Daugherty case holding that Congress had the power to summon witnesses was binding on all courts.[1]

This decision will probably be reviewed by the Supreme Court of the United States within the next two years. In its review the Court will have to decide whether the questions the Senate committee asked Sinclair were necessary to enable the Senate to carry on its constitutional business of legislating. As we have suggested previously, the Court in McGrain *v.* Daugherty simply ruled that a witness summoned by the Senate must come, thus confining its decision to the obligation of a witness to obey a Senate subpœna.

The Court in McGrain *v.* Daugherty did not cover an area in which differences will arise as to just what kind of questions a witness is obliged to answer after he has obeyed the subpœna.[2] In fact, the Supreme Court said that a witness when summoned by the Senate, must come forthwith; but

[1] U. S. *v.* Sinclair, 52 Wash. L. Rep. 451 (1924) also see 68th Cong., 1st sess., *Sen. Rep. 299*, ser. no. 8220.

[2] The court did make such statements as the following in this decision, "Testimony needed to enable the Senate efficiently to exercise a legislative function under the Constitution," "testimony to aid the Senate in legislating" and "a witness may refuse to answer where the questions are not pertinent to the matter under inquiry."

left open for future decisions the definition of just what questions a witness is obliged to answer. In other words, it left the witness free to take a chance by refusing to answer certain questions, and then see whether the courts would sustain his guess as to what he need not answer. If the witness guesses wrong he goes to jail, or suffers whatever other penalty may be imposed for contempt of the Senate.[1]

Very recently, a most important question came before the Supreme Court of the District of Columbia presided over by Mr. Justice Hoehling.[2] In a suit recently prosecuted in this court against Mr. Fall and Mr. Doheny for conspiracy to defraud the Government in the securing of the Naval Oil Leases at Elk Hills, California, the government attorneys attempted to introduce the testimony which had been given before a Senate Investigating Committee, investigating oil leases in 1924. The defense protested on the ground that this would be equivalent to forcing the defendants to testify against themselves, and hence contrary to the Revised Statutes of 1873,[3] which held:

No testimony given before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the same privilege.

The government attorneys claimed this provision in the statutes applied only to compulsory testimony, that the evidence in question had been given voluntarily and hence could be incorporated into a trial record.

[1] See discussion, *supra*, ch. iv, p. 295.

[2] For discussion and opinion of the court see *United States Daily*, December 1, 1926, p. 15 and issue of December 2, 1926, p. 7.

[3] See *supra*, ch. v, p. 324.

Justice Hoehling's decision pointed out that Section 859 U. S. Rev. Stat., which provides that testimony before a Congressional committee may not be used as evidence in any criminal prosecution against the witness, applies only to evidence given at the request of the committee. The court said, "Any witness in any judicial proceeding or before any investigating body, may freely waive immunity provisions or protection which may have been created in his favor, and thereafter he will be bound by the action taken by him in that regard."

By testifying voluntarily, both Doheny and Fall waived the protection of Sec. 859 it was held, and therefore statements made by them were admissible against them. The court noted that while Sec. 859 had been in force and effect for almost seventy years, no case had heretofore arisen calling for a judicial construction of its provisions.

In answering the argument of the defense attorneys that any and all testimony voluntarily as well as compulsorily given by a witness before a committee of Congress, is thereafter absolutely immune from use as evidence in any criminal proceeding against him, the court said, "If that be so, then it must result that the immunity afforded by the several sections of the Revised Statutes to which reference has been made, is greater than the immunity afforded by the Fifth Amendment; as to which latter, it has always been recognized, that the privilege and immunity afforded is personal to the individual and that he may waive it.

This decision then interprets Section 859, U. S. Rev. Stat. as applying only to compulsory testimony and restricts the immunity granted to witnesses by the statute. The decision in this case is directly in line with the opinion in Hale *v.* Henkel,[1] where the Supreme Court of the United States said, "The interdiction of the Fifth Amendment operates

[1] Hale *v.* Henkel, 201 U. S. 43 (1906).

only where a witness is asked to give testimony which may possibly expose him to a criminal charge."

A recapitulation of the cases studied thus far warrants the following conclusions: Both Houses of Congress have the power to punish for contempt. This power as to outsiders is conferred by fair implication [1] and represents the necessity of the use of judicial power in aid of the legislative function. The contempt may consist of misbehavior or disobedience. Misbehavior, in order to constitute contempt must be such as seriously to interfere with the ability of either House to function.[2] Contempt for disobedience arises in the matter of attendance, giving testimony, or the production of documents. Refusal to obey the demands of an investigating committee of either House of Congress constitutes a contempt, provided the demands of the committee arise in the course of an investigation which either House has the power to make and the testimony or documents required are relevant to the subject matter of the investigation. Neither branch of Congress is the final judge of its own powers and privileges where the private rights and liberty of the citizen are at stake, hence the limits of the Congressional power to make compulsory inquiries will be established by the courts from time to time as individual cases arise. These limits will very likely appear whenever either House of Congress attempts to use its power to punish for contempt in cases where there is a sweeping inquisition into the private affairs of a person, coupled with a vague purpose in making the investigation, or where the investigation cannot possibly result in remedial legislation. However, the presumption of validity attaches to a resolution of either House of Congress calling for an investigation and it will be presumed legislative in purpose

[1] Each House has the express power to "punish its members for disorderly behavior" (Constitution, art. i, sec. v, cl. 2).

[2] See Marshal *v.* Gordon, *supra* at pp. 362-366.

until the contrary is shown. In exercising the power to punish for contempt, either House may choose several methods. For example, a contumacious witness may be imprisoned by a House under its common-law or implied power until he purges himself of contempt or until the end of the session, or the House may certify the facts constituting such contempt to the courts as provided in the statutes. If the latter procedure is followed, an indictment may be brought against the offender and he be punished for a misdemeanor by fine and imprisonment. Finally, either House of Congress may construe the act of a witness in refusing to appear or testify before itself or one of its committees, as a contempt and punish the offender directly under its common-law power by imprisonment until he does testify or until the end of the session. At the same time either House may certify the facts of his contempt to the courts where his refusal to appear or testify may be interpreted as a misdemeanor under the statutes and hence subject him to the further penalty of fine and imprisonment. In other words, refusing to appear or testify before a Congressional committee or a House of Congress constitutes a double offense, namely, a contempt of the House concerned and a misdemeanor under the statutes.[1] Our study shows several cases where such double punishment was visited upon a contumacious witness.[2] Naturally the question arises in this connection, how could the courts punish the offender if he were already in the custody of a house? If the courts issued a warrant for his arrest would the house concerned discharge him and turn him over to the courts for indictment and prosecution under the statutes? Such has been the usual practice of the Houses of Congress although they have refused to surrender their prisoners on such summons in the past.[3]

[1] See *In re* Chapman, *supra* at p. 358.

[2] *Supra*, pp. 159, 160, 355, 356.

[3] *Supra*, pp. 329, 331.

The question as to what constitutes a valid subject for compulsory investigation by the Houses of Congress may be resolved as follows: Any investigation by Congress when acting in a judicial capacity under powers expressly granted or when inquiring into a serious breach of privilege has always been considered constitutional. Since McGrain *v.* Daugherty, it is now clearly established that a legislative investigation, that is, one into the administration of the law or one for the purpose of collecting information preliminary to legislation constitutes a proper subject. The distinction quite commonly made between the power of the House to investigate the administrative departments as contrasted with the power of the Senate in the same respect is no longer of any force, as the Supreme Court has said they are both on an equal plane in so far as legislative investigations are concerned.[1] As has been emphasized many times in this study, both the Senate and the House have been making such investigations ever since the organization of the government, but their practice in this respect was not clearly confirmed by the Supreme Court until Daugherty's case. Finally, it would seem that it is unnecessary for Congress to derive its authority to make compulsory investigations from the English Parliament when it was a high court, because the power when exercised by either House of Congress is a judicial function necessarily used in aid of a legislative function.

By and large, very few protests have been made by persons against the exercise of inquisitorial power by Congress; moreover the courts have said that a casual conflict with the rights of individuals is no reason to be urged against the exercise of such power, as the safety of the people is the supreme law.[2] Congressional investigations are irregular

[1] McGrain *v.* Daugherty, 273 U. S. 154, note argument of J. H. Wigmore against Senatorial investigations in Illinois *Law Review*, May, 1924.

[2] Anderson *v.* Dunn, 6 Wheaton 227.

proceedings in that they are not "cases", and so the commonly accepted rules of judicial procedure do not apply to them; as a result, all sorts of testimony is received under conditions which would not be tolerated for a moment in judicial proceedings.[1] Because of this it cannot be doubted that witnesses are often unjustly treated by being compelled to attend the hearings of such committees and submit to a veritable inquisition.[2] Our analysis of the practice of Congress in such investigations shows that many of the grosser abuses of privilege have never been questioned by suits before the courts. An important reason for the lack of protest against the exercise of inquisitorial power by Congress is that such protest might incur the instant displeasure of the offended house, instantly enforced, if it happened to be sitting. As Chief Justice Denman said, "It must be remembered that privilege is more formidable than prerogative, which must avenge itself by indictment or information, involving the tedious process of the law, while privilege with one voice accuses, condemns and executes. And the order to take him, addressed to the Sergeant-at-Arms may condemn the offenders to persecution and ruin.[3] Of course an offender can soon get free by virtue of a writ of habeas corpus, but still the stigma of accusation remains. In fact, a witness who refuses to answer questions propounded by a Congressional investigating committee because they are irrelevant, runs serious risks.[4] If the courts review his case

[1] See *supra*, ch. iv, pp. 285, 286, note—Felix Frankfurter has said that to slow up the proceedings of such committees by the rules applying in a court of law would seriously impair the investigative function of Congress. "Hands Off the Investigations," in *New Republic*, May 21, 1924.

[2] See Galloway, *op. cit.*, p. 58. Note: Congress has frequently taken no action against witnesses who have refused to answer irrelevant questions. See *supra*, p. 106 *et seq.*

[3] Stockdale *v.* Hansard, 9 A. & E. 1 (Eng. 1837).

[4] See "Congress Inquiries and the Constitution," by H. L. McBain, *New York Times*, March 11, 1928.

of contempt and decide the questions were irrelevant, he is free from further punishment. If the courts decide, however, that he should have answered, he may be fined and imprisoned, even though he is willing to go before the committee and answer the questions.[1] Moreover it should be recalled that it was commonly thought in Congress that the courts had no power to review its exercise of inquisitorial power until 1880.[2]

A certain amount of protection is given persons affected adversely by the Congressional power of investigation in that the amendments to the Constitution granting persons protection from "unreasonable searches and seizures" and the right of immunity from self-criminating testimony, have been interpreted by the courts as placing strictures on this power. For example, the Supreme Court made the following statements in McGrain *v.* Daugherty, "testimony needed to enable the Senate efficiently to exercise a legislative function belonging to it under the Constitution," "testimony to aid the Senate in legislating," and "a witness may refuse to answer where the questions are not pertinent to the matter under inquiry." As we have pointed out previously,[3] the general rule the courts have followed in determining the constitutionality of the Congressional power of investigation is, first, is the investigation one within the jurisdiction of Congress; second, is the testimony demanded material to the subject matter of the investigation? In Kilbourn *v.* Thompson [4] the testimony could not be required because the subject matter of the investigation was outside the jurisdiction of the House. Several cases involving the Interstate Commerce Commission and the Federal Trade Commission, which are

[1] For example see case of Robert Stewart, *supra*, pp. 355, 356.

[2] See debate in Kilbourn's case, *supra* at pp. 214-225.

[3] See *supra*, ch. vi, p. 383.

[4] Discussed *supra*, ch. vi, at pp. 350-354.

discussed in detail later in this study, shed some light on this problem. In *In re* Pacific Railway Commission [1] the court made much ado about the searching inquisition this Commission conducted into private papers and records and virtually limited the Congressional power of inquiry to voluntary testimony. While this decision was overruled in Interstate Commerce Commission *v.* Brimson,[2] the Supreme Court of the United States said in the latter case, "if the testimony and documents relate to the inquiry and the investigation is one which the Commission is legally entitled to make, anyone summoned before the Commission must obey its demands," yet the Court observed that

this power given to Congress did not carry with it authority to destroy or impair the fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen, hence each of the defendants in this proceeding could have contended that he was protected by the Constitution from making answer to the questions propounded to him.[3]

In Interstate Commerce Commission *v.* Baird the Supreme Court said, "Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact." [4] The dictum in Hale *v.* Henkel [5] takes the view that the Fourth Amendment does apply in cases of this sort, that some "particularity" is required; or again in Federal Trade Commission *v.* American Tocacco Company [6] the Supreme Court said, "a fishing

[1] *In re* Pacific Railway Commission, 32 Fed. 241; see *infra*, ch. vi, pp. 393-396.

[2] Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, see *infra*, ch. vi, pp. 398-400.

[3] *Ibid.*, p. 479.

[4] Interstate Commerce Commission *v.* Baird, 194 U. S. 25 (1904).

[5] Hale *v.* Henkel, 201 U. S. 43.

[6] American Tobacco Company *v.* Federal Trade Commission, 264 U. S. 298 (1924).

expedition into private papers on the possibility that they may disclose evidence of crime is contrary to the first principles of justice."

The Fifth Amendment has also been applied as a check on the investigative power of Congress, for that portion of the clause reading, " nor shall be compelled in any criminal case to be a witness against himself " has been understood by the courts to forbid the compelling of such testimony, unless Congress by specific statute afforded the person so testifying immunity from further prosecution for the act or acts concerning which he had been forced to testify,[1] or at least granted him assurance that the evidence forced from him would not be subsequently used against him. In interpreting this clause the Court said in Hale *v.* Henkel, " the interdiction of the Fifth Amendment operates only where a witness is asked to give testimony which may possibly expose him to a criminal charge — but if the criminality is taken away, the amendment ceases to apply." It was also stated in this case that, " the right of a person to refuse to criminate himself is purely a personal privilege of the witness." [2] In Counselman *v.* Hitchcock [3] the Court said of the Fifth Amendment, that it meant to " insure that a person should not be compelled to give testimony which might tend to show that he himself had committed a crime." [4] In the recent ruling of Justice Hoehling in Fall and Doheny's case [5] the court emphasized the fact that the manifest purpose of the Fifth Amendment was to prohibit the compelling of evidence of a self-criminating kind from a witness, and that the provision itself had been applied rather generally in a broad and

[1] See chap. v, *passim.*

[2] Hale *v.* Henkel, 201 U. S. 43.

[3] Counselman *v.* Hitchcock, 142 U. S. 547, 555 (1892).

[4] *Ibid.*

[5] See *supra*, pp. 381, 382.

liberal spirit to secure the citizen immunity from every species of compelled and voluntary accusation, but that the immunity offered by the Fifth Amendment was "personal to the individual and he may waive it." The statutes pertaining to Congressional investigations require a witness to testify even though what he says is a confession of crime. In order to comply with the terms of the Fifth Amendment, Congress has provided in these statutes that such testimony "shall not be used as evidence in any criminal proceeding against him in any court except in a prosecution for perjury committed in giving such testimony."[1] In view of the numerous rulings of the Federal Courts in cases of investigations conducted under authority of the Interstate Commerce Act and the Sherman Anti-Trust Act, which have held that witnesses must be given *complete* immunity from further prosecution for any offense arising out of the transaction to which their testimony relates, it would seem that the constitutionality of these statutes is open to the gravest doubt.[2] In fact, these decisions have restricted the demands of recent Senate committees for criminating testimony.[3]

Both branches of Congress have usually complied with the spirit of the Sixth Amendment in permitting persons on trial before them to have counsel and compulsory process for the obtaining of witnesses in their favor, but this has always been considered a matter of privilege, not of right. In fact, one well-known state case frequently cited in Congressional debate holds that a contumacious witness has no right to counsel in his behalf.[4]

[1] See Appendix B, p. 435.

[2] Counselman *v.* Hitchcock, 142 U. S. 547; Brown *v.* Walker, 161 U. S. 591 (1896); U. S. *v.* Armour & Co., 142 Fed. 808 (1906); U. S. *v.* Swift *et al.*, 186 Fed. 1002 (1911); also see *infra*, pp. 404, 405.

[3] See *supra*, pp. 288, 339, 340.

[4] People *ex rel.* McDonald *v.* Keeler, 99 N. Y. 463 (1885).

It should be mentioned in this connection that the prevailing opinion in Congress has always been that its proceedings in investigations were not strictly limited by the several Amendments to the Constitution; that these proceedings were not trials or cases at law.

In conclusion, it is clear that the courts have fully sanctioned the power of Congress to use the quasi-judicial process of compulsory investigation as an aid to its function of legislation, but this power is hemmed in by constitutional restrictions which will be applied from time to time by the courts as the occasion demands.[1]

PART II

POWER OF FEDERAL ADMINISTRATIVE AGENCIES TO COMPEL TESTIMONY AND PUNISH FOR CONTEMPT

The years immediately following the Civil War witnessed an increasing volume of speculation and fraud in railway affairs which reached its climax in the frenzied construction period of the eighties. In order to ferret out these abuses and eliminate the evils so rife during this period, a new form of the investigating arm of Congress was called upon. On February 4, 1887, Congress passed the Interstate Commerce Act,[2] which created the Interstate Commerce Commission and gave it extensive powers to compel testimony. Section 12 of this Act gave this Commission authority to

> require the attendance and testimony of witnesses and the production of all books, papers and tariffs . . . and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers and documents under the provisions of this

[1] *Cf.* Landis, James, "Constitutional Limitations on the Congressional Power of Investigation," 40 *Harvard L. Rev.* 153.

[2] 24 *Stat. at Large*, 379.

act. And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act or other person, issue an order requiring such common person or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that such testimony or evidence may tend to criminate the person giving such testimony shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

These provisions for compelling testimony have been granted by Congress to a great variety of administrative tribunals or executive officials vested with regulatory or investigatory powers or both.[1] Judge Cooley who presided over the newly created Interstate Commerce Commission stated in the first annual report of the Commission that this power to compel the attendance of necessary witnesses and the power to secure papers and documents relevant to inquiries, "was a very important provision, and the Commission will no doubt have frequent occasion to take action under it."[2]

It will be noted that the Commission was not given the power itself to compel the attendance and testimony of witnesses but rather it had to invoke the aid of the courts. It is a fundamental fact in a discussion of the inquisitorial powers of such administrative bodies that they cannot themselves compel a witness to appear before them and testify. The same rule applies, as has been noted, to investigating com-

[1] See study of David Lilienthal, "Power of Governmental Agencies to Compel Testimony," 39 *Harvard L. Rev.*, 694.

[2] 1 *Ann. Rep. I. C. C.*, 25 (1887).

mittees acting under authority of Congress. The courts have said, "In a judicial sense there is no such thing as contempt of a subordinate administrative body . . . and the power to compel performance of a legal duty imposed by the United States can only be exerted under the law of the land, by a competent judicial tribunal having jurisdiction in the premises." [1] Hence the enforcement of the power conferred on these tribunals to compel testimony must therefore be reposed in the courts.[2] The procedure outlined in Section 12 of the Interstate Commerce Act for the compulsion of testimony involved three stages: First, the tribunal was given the power to issue subpœnæ for the attendance of witnesses and production of papers; if such subpœnæ were disobeyed, the tribunal was then authorized to invoke the aid of the courts; and finally, the court appealed to, was authorized to order contumacious witnesses to obey the demand of the tribunal for evidence and upon failure to comply the court was authorized to punish the witnesses for a contempt of court.

These provisions providing for the compulsion of testimony were destined to be storm-centers of litigation for the next fifteen years and the cases involved serve to bring out some important points with respect to the power of Congress to compel testimony in this manner.

On March 3, 1887 Congress passed an act providing for a special investigation of the "books, accounts and methods of railroads which have received aid from the United States and for other purposes." [3] The act also authorized the President to appoint three commissioners who were invested with the identical power to compel testimony given to the

[1] Interstate Commerce Commission *v.* Brimson, 154 U. S. 489 (1894).

[2] *Ibid.*, pp. 447, 485.

[3] 24 *Stat. at Large*, 488.

Interstate Commerce Commission, the terms of the two sections being exactly the same. In the discharge of their duties the Commissioners examined as a witness Mr. Leland Stanford, who was the President of the Central Railroad, one of the railroad corporations being investigated. He was asked certain questions pertaining to the business of the corporation, especially with reference to the disbursement of money, which he refused to answer. The commission then applied to the court of the Northern District of California for an order requiring him to answer, whereupon the court issued an order requiring him to show cause why he should not be required to answer the interrogations of the commission. He filed an answer which stated, among other things, that,

> because the answers can have no possible effect upon the relations between the government and the company and can only tend to cast suspicion upon parties whose names may be mentioned: and as the subjects in respect to which these questions are propounded, are of an exclusively private nature, in no way affecting the interests of the government, neither the company nor its officers feel called upon to answer.[1]

He also stated that he felt constrained to take this course, as the gentlemen of the commission had distinctly and repeatedly avowed, in the course of their examination that they did not regard themselves bound in such examinations by the ordinary rules of evidence; that they would receive hearsay and *ex parte* testimony, surmises, suspicions, and all character of information that might be called to their attention.[2]

In deciding the case the court held that, "Congress cannot make the judicial department the mere adjunct or instrument of the other departments" and therefore the procedure outlined for the compelling of testimony was unconstitutional.

[1] *In re* Pacific Railway Commission, 32 Fed. 241 (1887).

[2] *Ibid.*, p. 248.

In reaching this conclusion the court admitted that Congress could authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess, but that such inquiries were controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters, that is, the production of private books and papers can only be compelled in judicial proceedings or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence those books and papers contain. But inasmuch as the commission was not a judicial body but a mere board of inquiry directed to obtain information upon certain matters, it could only obtain such information as the persons it examined cared to disclose.

In commenting upon the procedure outlined for compelling testimony the court pointed out that if a court is to aid the commission in this manner of investigation,

> there can be no room for the exercise of judgment as to the propriety of the questions asked . . . but if it was expected that the court, when its aid was invoked, should examine the subject of the inquiries to see their character then it would be called upon to exercise advisory functions in a political proceeding. If the former, they cannot be vested in a court, if the latter, the power can only be exercised in the case or controversies enumerated in the constitution, or in cases of habeas corpus.[1]

Close adherence to this ruling meant its application to all commissions of inquiry which Congress might create and, in effect, the decision denied to Congress the right to obtain information through the instrumentality of all such commissions, except from witnesses who voluntarily appear and testify, for, as has been noted, it is commonplace that a com-

[1] *In re* Pacific Railway Commission, 32 Fed. 258.

mission created by act of Congress could not punish for contempt and if the courts could furnish no aid, the only source of information would be testimony voluntarily furnished. Inasmuch as section 12 of the Interstate Commerce Act was identical with the provisions in the statute providing for compulsory testimony in this case, the effect of this decision was to deny its constitutionality also.

Of course it is true that the courts cannot be made mere executive agents for the legislative department, but it should be noted that the language of the act furnishing the commission with power to compel testimony was not mandatory, but permissive; in other words, the court "may" declare the act a contempt if satisfied it is one after examination, that is, the aid invoked here is that of a court. The court in rendering its opinion made much ado about the interference with private rights which such an investigation entailed and quoted approvingly from Kilbourn *v.* Thompson.[1]

Study of the questions asked Stanford does not indicate that they were excessively inquisitorial. Moreover, there is no proof that legislation would not result from the findings of the Commission. The dicta of the case sets off the private rights of the individual against the public need for information and the former was considered more important. It is true that the act creating the Commission was very broad and the matter to be investigated had wide ramifications, but then wise legislation can only be enacted on the basis of such investigation. There is no reason why such attempts at investigation should have been treated as "interference with private business." To restrict disclosures to judicial proceedings in which private rights are being determined, as Judge Field would have it in this case, would be to make the public regulation of business impossible.

However, much of this case was overruled by a Supreme

[1] Kilbourn *v.* Thompson, 103 U. S. 168 (1880), see *supra*, p. 350.

Court decision a few years later in Interstate Commerce Commission *v.* Brimson.[1] An appeal brought up for review before the Court a judgment dismissing a petition filed in the Circuit Court of the United States by the Interstate Commerce Commission under the Interstate Commerce Act.

The petition was based on the twelfth section of the Act, authorizing the Commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books and papers.[2]

The Circuit Court held that section to be unconstitutional and void, as imposing on the judicial tribunal of the United States duties, that were not judicial in their nature. In the judgment of the Court, this proceeding was not a "case" to which the judicial power of the United States extended. Thus it regarded the petition of the Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial character, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

In forming this decision, the Court said:

> Undoubtedly, Congress may confer upon a non judicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry, an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to incriminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties within

[1] Interstate Commerce Commission *v.* Brimson, 154 U. S. 447 (1894).

[2] See *supra*, p. 391.

the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a non judicial body.[1]

The similarity of the language in this decision of the Circuit Court and of the Court in *In re* Pacific Railroad Commission is obvious.

However the Supreme Court refused to accept this interpretation of the power of Congress to compel testimony, saying, "This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to Congress within much narrower limits than, in our judgment, is warranted by that instrument." [2] The Court added that an adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and require the production of books, documents, and papers relating to that subject, "would go far towards defeating the object for which the people of the United States placed commerce among the States under National control." [3]

The issues between the Commission and the witness, the Court said, were:

> Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers etc. in his possession, is or is not violation of his duty or in derogation of the rights of the United States seeking to execute a power expressly granted to Congress.[4]

The Court observed that the question presented was substantially that which would arise if the witness were pro-

[1] *In re* Interstate Commerce Commission, 53 Fed. 476, 480 (1892).

[2] 154 U. S. 474.

[3] *Ibid.*, p. 474.

[4] *Ibid.*, p. 476.

ceeded against by indictment under an act of Congress declaring it to be an offense against the United States for any one to refuse to testify or to produce the required books, papers and documents. A prosecution for such offense or a proceeding by information to recover such penalties would have as its real and ultimate object to compel obedience to the rightful orders of the Commission, while it was exerting the powers given to it by Congress. And such the Court said, "is the sole object of the present direct proceeding." [1] So the Court upheld the twelfth section of the Interstate Commerce Act authorizing the Circuit Courts of the United States to use their process in aid of inquiries before the Commission established by that act, denying the Circuit Court's contention that such duties were not judicial. The petition of the Commission under that section was held to be a case to which the judicial power of the United States extends. The Court also said that every citizen is obliged to obey the law, hence anyone summoned before the Commission must testify and produce documents, if the testimony and documents relate to the inquiry, and the investigation is one which the Commission is legally entitled to make.

Of course the Court noted, that the power given to Congress did not carry with it authority to destroy or impair the fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen, hence each of the defendants in this proceeding could have contended that he was protected by the Constitution from making answer to the questions propounded to him or that he was not bound to produce the books, papers, etc. ordered to be produced, or that neither the questions propounded nor the books etc. related to the particular matter under investigation, nor to any matter which the Commission was entitled to investigate. This issue being determined

[1] 154 U. S. 477.

in their favor by the Circuit Court, the petition of the Commission could have been dismissed upon its merits.

The Court pointed out the necessity for the courts deciding these questions as the inquiry whether a witness before the Commission is bound to answer a particular question propounded is one that cannot be submitted to a subordinate or executive tribunal for final determination, as such a procedure would not be due process of law.

An analysis of this decision shows that it clearly overrules both the decision in this case in the lower court and the decision in *In re* Pacific Railroad Commission, and holds that section 12 of the Interstate Commerce Act of 1887 provides constitutional procedure for the compelling of testimony before the Commission. In other words, the decision in the lower courts that, " Congress cannot make the judicial department the mere adjunct or instrument of the other departments " was reversed and the Supreme Court, although by a bare majority opinion, decided such proceedings did constitute a case or controversy within the meaning of the Constitution.

The effect of this decision was to strengthen the power of Congress to set up an administrative commission and delegate to it power hitherto resident alone in the courts and Congress, to compel the attendance and testimony of witnesses as well as the production of papers by imposing the enforcement of such power on the courts.

Yet the decision also contained a warning, for the Court stated, that the fundamental guarantees of personal rights contained in the Constitution cannot be impaired by these investigations and the compulsory power can only be used in cases where Congress has power to investigate and where the questions asked are pertinent and relevant to the inquiry.

Another ground for contesting the right of the government to extort testimony from unwilling witnesses arose

from an amendment of the Interstate Commerce Act intended to increase its effectiveness. Originally punishable only by heavy fine, on recommendation of the Commission, Congress added in 1889 an amendment whereby departure from the published rate was made punishable also by imprisonment. By this change, criminal, as well as civil procedure was brought into play. In 1890, one Counselman appeared before the grand jury, in response to a subpœna served upon him, and later having been duly sworn, refused to answer in his testimony certain questions concerning his enjoyment of less than the open rate on grain, taking refuge under the Fifth Amendment to the Constitution. This declared that no person ". . . shall be compelled in any criminal case to be a witness against himself." Having been adjudged by the District Court of Illinois to be in contempt, fined $500 and kept in custody until he should have answered the questions of the grand jury, he appealed to the Circuit Court, which upheld the action of the District Court. He then appealed to the Supreme Court of the United States which, after a lengthy decision, ordered him discharged from custody.[1]

The Court held that the Fifth Amendment to the Constitution as described above was a direct protection to the witness, that he did not have to answer such questions, the answers to which would incriminate him. Thus the Court maintained that the Revised Statutes of the United States which for twenty-five years had been held to protect the constitutional rights of witnesses when called upon to give testimony against criminal proceedings based on such evidence, did not in fact adequately afford such protection. Counselman was ordered discharged from the custody of the United States Marshal. It was held furthermore " that a statutory enactment to be valid, must afford absolute immunity for the offense to which the question relates."

[1] Counselman *v.* Hitchcock, 142 U. S. 547 (1892).

The two statutes of Congress reviewed in this case were as follows: Section 860 of the Revised Statutes provided: [1]

No pleading of a party nor any discovery or evidence obtained from a party or witness by means of judicial proceedings in this or any foreign country shall be given in evidence or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture. Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

This statute was a reenactment of the following one: [2]

That no answer or other pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of such act or omission of such party or witness; Provided, That nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovery or testifying as aforesaid.

The contention of the appellee was that this statute, by excluding such evidence as Counselman might be forced to give, from being used against him, or his property or estate, in any court of the United States, was adding to the guarantees of the Constitution. Before its passage, voluntary admissions were always admissible in evidence against an

[1] Rev. Stat. 860 (repealed by 36 Stat. 862).

[2] 15 Stat. 37, section i "An Act for the Protection in Certain Cases of Persons making Disclosure as Parties or testifying as witnesses."

accused. The Fifth Amendment sought only to preclude the use of involuntary testimony, while the act in terms excludes both voluntary and involuntary admissions.[1] Of course it was admitted that the statute aided the United States in obtaining testimony which would otherwise be debarred by virtue of the Fifth Amendment.

It was further contended by the attorneys for the appellee that the meaning of the Fifth Amendment was that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself, whereas they claimed that an investigation before a grand jury was in no sense a criminal case.[2] As they said:

> The inquiry is for the purpose of finding whether a crime has been committed and whether anyone shall be accused of an offense. The inquiry is secret; there is no accuser, no parties, plaintiff, or defendant. The whole proceeding is ex parte, the testimony being confined to one side, and the evidence adduced is not governed by the rules or the manner or method by which testimony is adduced or admitted on the trial of cases in court. Such an investigation is not a criminal case within the meaning of the Constitution.[3]

However, as we have seen, the Court interpreted this constitutional provision differently. Its object was, according to the decision,

> to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. . . . It is entirely consistent with the language of Article five, said the court, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.[4]

[1] 142 U. S. 547.

[2] *Ibid.*, p. 554.

[3] *Ibid.*, p. 555.

[4] *Ibid.*, p. 563.

The Court further showed in pointing out the lack of adequate protection afforded the witness by the statutes that they could not and would not prevent his testimony being used against him or his property in a criminal proceeding in such court.

It should be noted in this connection that the statutes brought up for review in this case were identical with that portion of the Act of 1857 as amended in 1862, referring to the same matter. These latter statutes applied only to the refusal of witnesses to testify before either House of Congress or one of their committees, and as originally enacted in 1857,[1] granted full and absolute freedom from prosecution for any act or transaction to which the witness may have testified. In this form the act was found to have worked great mischief [2] and so was amended in 1862 to read that only the testimony and evidence testified to by a witness was exempt from use against him in subsequent prosecution, but implied that he might be prosecuted for the act to which he had testified.

By these acts Congress believed that in its investigations, no witness could find refuge in the Fifth Amendment and refuse to answer certain questions because they might criminate him. It would seem then that the spirit of this decision would tend to nullify the Act of 1857 as amended in 1862, for it was identical with Section 860 of the Revised Statutes, the only difference being that the former applied to "congressional investigations" as already explained, while the latter referred generally to any judicial proceeding. However, what could be the intrinsic difference between a Congressional investigation conducted by one of the Houses of Congress by means of a committee, and an investigation authorized by Congress and conducted by a Federal grand

[1] See *supra*, ch. v, p. 312.

[2] *Ibid.*, pp. 320, 323.

jury, or on the other hand by the Interstate Commerce Commission itself? In the light of the precedent of Congress as illustrated in its committee investigations, it seems logical that the latter two types of investigations ought to be as free within the limits of the act authorizing them as the investigations by Congressional committees. All are inquiries conducted in the last analysis by Congress and have all the characteristics of such, as for example, *ex parte* testimony, no right to counsel and lack of observance of judicial procedure in general on the proceedings. As stated previously, Congressional committees have hesitated in recent years to compel witnesses to give testimony where they have claimed immunity under the Fifth Amendment, because of the doubt which exists as to the constitutionality of their powers in this respect.[1]

After the decision in Counselman *v.* Hitchcock the Interstate Commerce Act was amended by an Act approved February 11, 1893,[2] as follows:

> That no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any case or proceeding, criminal or otherwise, based upon or growing out of an alleged violation of the Act of Congress . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedi-

[1] See *supra*, p. 390.

[2] 27 *Stat.* 443.

ence to its subpoena, or the subpoena of either of them, or in any such case or proceeding;

Provided; That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or the lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine of not less than $100, nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Careful reading of this act shows that the objection to the former statute, that it was too narrow and did not afford full protection consonant with the Fifth Amendment, was eliminated.

However, the Federal Courts did not at first agree with this view of the Amendment of 1893, for in 1894 in an Illinois Court this act was held to violate the Fourth and Fifth Amendments to the Federal Constitution, which declare that the right of the people to be secure against unreasonable searches and seizures shall not be violated, and that no person shall be compelled in any criminal case to be a witness against himself.[1]

The grand jurors of the United States Northern District Court of Illinois reported to the court that they were engaged in inquiring into certain alleged violations of the Interstate Commerce Act by certain railroads, and that James G. James being before them in response to a subpœna as a witness, and being inquired of respecting his knowledge of the shipment of certain products from Chicago east at a less freight

[1] U. S. *v.* James, 60 Fed. 257 (1894); see also Hale *v.* Henkel, 201 U. S. 43 (1906).

rate than was named in the open tariffs then in force, declined to answer the question for the reason that an answer thereto would tend to criminate him personally, or would disclose a source of evidence which would tend to criminate him personally, under the provisions of the Interstate Commerce Act. Another witness, Gordon McLeod, refused to produce certain reports for the same reason.[1]

It was claimed by the attorney for the United States that the Act of 1893 afforded all the immunity that the Fifth Amendment was intended to provide. However the court said, "If the guarantee of the Fifth Amendment be simply against a compulsory self-invoking of the penalties and forfeitures of the law, as distinguished from the other consequences of self-accusation, the claim is, in my opinion, well founded.[2] But after looking at the real purpose of the framers of the Fifth Amendment, the court asked the question, "Did they intend to guarantee immunity against compulsory self-accusation of crime, so far as it might bring to the witness law-inflicted penalties and pains only? Or, was it the purpose to make the secrets of memory, so far as they brought one's former acts within the definitions of crime, inviolate as against judicial probe or disclosure?"[3]

The court answered that the latter was the real purpose of the Amendment, and hence the immunity granted by the Constitutional provision was not simply against the use of the selfaccusatory evidence in subsequent prosecutions and the statute therefore did not fully meet the Constitutional requirement.[4] In other words, the privilege which the framers of the Amendment secured was silence against the accusa-

[1] U. S. *v.* James, 60 Fed. 258 (1894) p. 258.

[2] *Ibid.*, p. 259.

[3] *Ibid.*, p. 261.

[4] *Ibid.*, p. 264.

tions of the Federal Government—silence against the right of the Federal Government to seek out data for an accusation.—The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, or in the unfathomable disgrace, not susceptible of formulation in language which a known violation of the law brings upon the offender?[1]

The doctrine in this case is in full accord with that of Counselman *v.* Hitchcock.[2] The court still did not believe that the immunity granted by the statutes was wide enough to serve as a substitute for the Fifth Amendment and it seemed very fearful of the rights of the individual. Naturally, if a witness could refuse to testify when questioned by any agency of the Government seeking information in accordance with authority granted by an Act of Congress, on the grounds of a violation of his personal rights as guaranteed by the Constitution, the effectiveness of such investigations was seriously checked.

About a year later the same issue was before a subordinate Federal Court, but was this time carried on appeal to the United States Supreme Court, where the James's decision was overruled.[3] In this case, one Brown had been subpœnæd by the grand jury, at a term of the District Court of the Western District of Pennsylvania to testify in relation to a charge then under investigation by that body against certain officers and agents of the Allegheny Railroad Company for an alleged violation of the Interstate Commerce Act. When asked certain questions he refused to testify on the ground that such answers would tend to incriminate and accuse him. The grand jury reported his refusal to the District Court which held him in contempt, fined him, and

[1] U. S. *v.* James, 60 Fed. 264 (1894) p. 264.

[2] See *supra*, p. 403.

[3] Brown *v.* Walker, 161 U. S. 591 (1896).

held him in custody until he answered the questions. He appealed to the Circuit Court, which dismissed his writ, and then to the Supreme Court.

In the resulting decision the Court said, "This case involves an alleged incompatibility between that clause of the Fifth Amendment to the Constitution," which declares that no person "shall be compelled in any criminal case to be a witness against himself," and the Act of Congress of February 11, 1893.[1] The Court then referred to the decision in Counselman *v.* Hitchcock which held that, "in view of the Constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for the offense to which the question relates. To meet this requirement and to satisfy this construction of the Constitutional provision, the act in question was passed, exempting the witness from any prosecution on account of any transaction to which he may testify. The case before us is whether this sufficiently satisfies the Constitutional guarantee of protection."[2] The Court held that it did and that the witness was compellable to answer and thus affirmed the judgment of the court below. So the final outcome in 1896 was a complete denial of the right of witnesses to withhold material testimony in inquiries arising under the Interstate Commerce Act, although it required six years of litigation to bring about this result.

In 1904 on complaint of William Randolph Hearst, the Interstate Commerce Commission conducted an inquiry into the practice of certain companies, owned by a railroad, of buying coal at the mines or breakers under a contract fixing the price to the vendor on the basis of a percentage of the average price received at tidewater in another state. It was

[1] 27 *Stat.* 443, see *supra*, pp. 405, 406.

[2] 161 U. S. 593.

claimed by the Commission that the transaction was the means whereby the railroad gave preference in rates to the companies selling coal.

Certain witnesses of the Company refused to divulge the nature of these contracts and produce certain documents, whereupon the Commission petitioned the Circuit Court to order their production as evidence. However the Circuit Court refused to do so, holding that the documents asked for were irrelevant to the subject matter which the Commission might investigate under the authority of the Interstate Commerce Act. They were intrastate contracts pertaining to intrastate business, and were no affair of the Commission, according to the Court.

The Commission appealed to the Supreme Court of the United States which upheld its authority to demand the production of said contracts, claiming them to be relevant evidence bearing upon the manner in which the rates were fixed, and their production before the Commission in an investigation properly commenced, as to the reasonableness of coal rates, should be ordered by the Circuit Court.[1]

The Supreme Court in considering this case, emphasized the competency of Congress to invest the Commission with authority to require the attendance and testimony of witnesses, and production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. Moreover, the Court added, such an inquiry of the Commission should not be too narrowly constrained by technical rules, as to the admissibility of proof. " Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof." [2]

[1] Interstate Commerce Commission *v.* Baird, 194 U. S. 25 (1904).

[2] *Ibid.*, p. 44.

As to the claim of the witnesses that the contracts were not relevant matter, the Court said, "Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. Relevancy is that quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue between the parties to a suit." [1]

With respect to the interference of such inquiries with the rights of citizens the Court concluded by saying:

> Compelling the giving of such testimony and the production of such contracts does not deprive the witnesses of any rights under the Fourth and Fifth Amendments to the Constitution of the United States . . . it is not proper to unreasonably hamper the Commission by narrowing its field of inquiry beyond the requirements of the protection of the rights of citizens as that would seriously impair its usefulness and prevent a realization of the salutary purposes for which it was established by Congress.[2]

The Baird case extended the power of the Commission to make inquiry and emphasized the need for a reasonable interpretation of its authority in compelling testimony. In Harriman *v.* Interstate Commerce Commission[3] the power of the Commission to make investigations was again questioned by the Supreme Court of the United States. Beginning in November, 1906 the Commission made an investigation of the combination practices of certain railroads. During the course of its inquiry, Harriman was called by the Commission and testified as a witness. He was asked about certain stock transactions of the Union Pacific Railroad of which he was president and director. Upon the

[1] Interestate Commerce Commission *v.* Baird, 194 U. S. 25 (1924).

[2] *Ibid.*, p. 47.

[3] Harriman *v.* Interstate Commerce Commission, 211 U. S. 407 (1908).

advice of counsel he declined to answer certain of these questions. In accordance with the terms of the Interstate Commerce Act the Circuit Court ordered them to be answered, whereupon the witness appealed. Harriman also refused to answer two other questions, more general in character, and the Court was asked to order him to answer them also. The Court denied the petition of the Commission in the latter case, so the Commission appealed to the Supreme Court of the United States. So there were two appeals before the Court, one by Harriman and one by the Commission.

The contention of Harriman's attorneys in the argument before the Supreme Court was that Congress has conferred upon the Interstate Commerce Commission authority to investigate, and in connection therewith, to compel the testimony of witnesses only in aid of its duty to execute and enforce the provisions of the act to regulate commerce; that the Commission is a body of limited powers derived exclusively from the act to regulate commerce; and that the restricted operation of the act limits the powers of the Commission.

On the other hand, the attorneys for the Commission argued that the Commission in making this investigation, had all the power of a Congressional committee of inquiry, so far as interstate carriers are concerned, and could inquire into the management of such carriers not only for purposes of regulation, but to recommend additional legislation. They said that to uphold the witnesses in their contumacy would be to prejudge Congress, and to hold that by no rational possibility could it legislate upon the subject at issue, and this without permitting Congress through the Interstate Commerce Commission to obtain the facts upon which such legislation could properly be constitutionally based; and without permitting Congress itself after it shall have acquired such facts, within its constitutional powers of debate, to

consider them. As to the power which entitles legislative committees to elicit information of the character here sought, the attorneys referred to the decision *In re* Chapman.[1]

However, the Court put a narrow construction on the power of the Commission and held that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation of the Act, and investigations by the Commission upon matters that might have been made the subject of complaint, "that the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary, those where the investigation concerns a specific breach of the law."[2] In other words, in interpreting the Act the Court said, "It is plain that there was no thought of allowing witnesses to be summoned except in connection with a complaint for contraventions of the act, such as the Commission was directed to investigate, or in connection with an inquiry instituted by the Commission, in the same manner and to the same effect as though complaint had been made." Obviously such an inquiry is limited to matters that might have been the object of complaint.

The Court claimed the contention of the Commission was altogether too broad, namely,

> that it may make any investigation that it deems proper, not merely to discover facts tending to defeat the purposes of the Act, but to aid it in recommending additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind.[3]

[1] *In re* Chapman, 166 U. S. 661 (1897); see *supra*, ch. vi, pp. 358-361.

[2] 211 U. S. 420.

[3] *Ibid.*, p. 417.

The Court pointed out that the enormous scope of the power asserted for the Commission should be emphasized and dwelt upon.

> The legislation that the Commission may recommend, embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several States. And the result of the arguments is that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled.[1]

This decision then stands for the position that an administrative commission created by an act of Congress is limited in its power of investigation to execute and enforce the provisions of such act, that the restricted operation of the Act limits the powers of the Commission; and that in this case there was nothing in the act giving the Commission the power to compel the testimony of witnesses in investigations instituted on its own motion rather than the usual procedure of investigating after a complaint had been made to the Commission that the Act had been violated. So there was nothing in the Act to warrant the contention that Congress has conferred upon the Commission all the inquisitorial powers of Congress with respect to interstate commerce. Three justices dissented from the opinion, showing there was considerable doubt in the Court as to such a narrow restriction of the power of investigation.

After this decision, Congress amended section 13 of the Interstate Commerce Act to read:

> The Interstate Commerce Commission shall have full authority

[1] *In re* Chapman, 166 U. S. 417 (1897) p. 417.

and power at any time to institute an inquiry on its own motion in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provisions of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.[1]

This amended section 13 of the Act came before the Court for review in Smith *v.* Interstate Commerce Commission.[2] The Senate had by a resolution directed the Interstate Commerce Commission to investigate, take proof and report to it, among other things, what amount, if any, certain railroads, or any of them, had subscribed, expended or contributed to prevent other railroads from entering their territory, for maintaining political or legislative agents, for contributing to political campaigns or for creating sentiment in favor of any of the plans of any of the railroads.

In pursuance of the resolution, the Commission ordered an investigation. During the hearings, the president of one of the companies, one Smith, subpœnaed as a witness, was asked by counsel for the Commission what, if any, funds his company had expended in certain years for political campaign purposes and charged upon its books to operating or legal expenses or construction account. The witness refused to answer.

On appeal the case came before the United States Supreme Court, which held that the investigation, particularly as related to and defined by the questions asked, was not to be regarded as directed to the political activities of the carrier or its efforts to suppress competition, but as seeking the information in order to ascertain the amount expended. Moreover, such an investigation was proper in view of the general purposes and objects of the Interstate Commerce Act. Also

[1] Amendment of June 18, 1910, c. 309; 36 *Stat.* 550, section 11.

[2] Smith *v.* Interstate Commerce Commission, 245 U. S. 33 (1917).

the Court called attention to the fact that Section 13 of the Act had been amended and that under it the Commission's power of investigation is not necessarily limited to cases in which evils or abuses are definitely charged or remedies are proposed—nor is its right of inquiry in a particular proceeding necessarily to be measured by the scope of the proceedings as defined by the order instituting it.[1]

The question of the power of the Commission to investigate came before the Court in another case involving the interpretation of Section 20 of the Interstate Commerce Act.[2] This section as amended in 1906 gave the Commission power to control the accounting systems of railroads, and also to require such other information from common carriers as the Commission might deem necessary in enforcing the act. Under the authority granted in this section the Commission sent out a circular calling for statistics from every water carrier within the jurisdiction of the Commission as a basis for the determination of the proper form of the annual reports for water carriers. Certain water carriers refused to answer as to that portion of the report which did not concern joint business with the railroads, on the ground that it was irrelevant matter and of no concern to the Commission. On appeal to the Supreme Court of the United States, the Court compelled answer on the general ground that information concerning all the transactions of those carriers was necessary if the Commission was properly to regulate matters within its jurisdiction, that section 20 of the Interstate Commerce Act conferred this authority, and that the power there granted did not exceed the constitutional power of Congress.[3]

[1] 36 *Stat.* 550, section 11, p. 34.

[2] Interstate Commerce Commission *v.* Goodrich Transit Company, 224 U. S. 194 (1911).

[3] *Ibid.*

A recapitulation of the cases involving the exercise of inquisitorial power by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act establishes the following: The right of Congress to delegate by an act such power to a commission having continuous existence,[1] the commission being restricted in its investigations, however, by the terms of the act creating it and defining its authority,[2] which is to say that commissions created by act of Congress are agencies of limited purpose, as is the case with committees of Congress acting under resolutions of the Senate or the House of Representatives; Congress may by statute order the courts to aid the Commission in requiring testimony from contumacious witnesses; [3] these inquiries are not to be considered as trials,[4] hence the formal rules of evidence governing procedure in cases at law need not be observed in such proceedings, although witnesses cannot be compelled to testify against themselves unless the protection afforded them by the Fifth Amendment is granted them in these inquiries by statute; [5] while the compulsion of testimony before such a non-judicial administrative tribunal as the Interstate Commerce Commission deprives a person of his liberty and property, yet such a proceeding is due process; [6] the demands of such a Commission for testimony must be relevant to the matter in which Congress is interested as defined in the act establishing the Commission's authority, and the refusal of a witness to testify on the

[1] Interstate Commerce Commission *v.* Brimson, see *supra*, p. 398.

[2] Harriman *v.* Interstate Commerce Commission, see *supra*, p. 414; also Interstate Commerce Commission *v.* Brimson, see *supra*, p. 399.

[3] I. C. C. *v.* Brimson, *supra* at p. 399.

[4] I. C. C. *v.* Baird, *supra* at p. 410.

[5] Counselman *v.* Hitchcock, *supra*, at p. 401; Brown *v.* Walker, *supra*, at p. 409.

[6] I. C. C. *v.* Brimson, *supra* at p. 399; also I. C. C. *v.* Baird, *supra* at p. 411.

ground that the testimony demanded is not relevant to the subject matter which the Commission may legally investigate calls for a decision from the courts as to its relevancy.[1]

By and large these investigations show that while the rights of citizens, such as freedom from search, privacy and the right of private property are certain to be impinged upon, yet protection is offered by the fact that compulsory orders of the Commission can only be enforced, if opposed, by final order of the courts, which sit in review, where controversies arise concerning the power of the Commission to compel information. Moreover a witness who refuses to answer questions propounded by the Interstate Commerce Commission or other Federal commissions with similar powers, does not run the risk of immediate indictment and prosecution for a misdemeanor, as is the case with witnesses who refuse to answer the questions of a Congressional investigating committee.[2]

Turning our attention to the Federal Trade Commission, a body with powers of investigation quite similar to those of the Interstate Commerce Commission, we find that the fourteen years of its existence have not established any noteworthy standards for judging the power of such inquisitorial bodies.[3] The first Chairman of the Federal Trade Commission in commenting on its powers said that it has been specifically granted by the act of its creation more extensive powers of investigation than have been granted to any other body in the history of our government.[4] The clauses of the Federal Trade Commission Act granting the Commission inquisitorial powers were as follows: Section 6, paragraph (a)

[1] I. C. C. *v.* Brimson, *supra* at p. 400; I. C. C. *v.* Baird, *supra* at p. 411; Smith *v.* I. C. C., *supra* at p. 415.

[2] See *supra*, p. 386.

[3] See David Lilienthal, *op. cit.*, p. 715.

[4] J. E. Davis in *Growth of American Administrative Law*, p. 17.

That the Commission shall have power to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations and partnerships. Paragraph (h) To investigate from time to time, trade conditions in and with foreign countries where associations, combinations or practices of manufacturers, merchants or traders, or other conditions, may affect the foreign trade of the United States and to report to Congress thereon, with such recommendations as it deems advisable. Section 9 of the Act authorized the Commission to enforce these powers by the usual appeal to the courts.[1]

Under these broad powers to search for facts of economic and social significance, a great volume of investigation has been successfully undertaken, but in every instance in which the aid of the courts has been invoked, the exercise of the power of compelling testimony has been denied, in each case upon some construction of the language of the Act.[2] For example, the Commission has been enjoined from seeking information which did not relate to interstate commerce, that the Commission under the terms of the Act was without such power.[3] Again in United States *v.* Basic Products Company,[4] the Commission, under authority of Section 6 and without having before it charges of violation of law, sought information from the Basic Products Company con-

[1] 38 *Stat.* 717, Act of September 26, 1914.

[2] See John L. Mechem, "Fishing Expeditions by Commissions," 22 *Mich. L. Rev.* 776.

[3] Federal Trade Commission *v.* Claire Furnace Company, 285 Fed. 936 (1923).

[4] U. S. *v.* Basic Products Company, 260 Fed. 472 (1919).

cerning its business. It filed a petition for mandamus, which the court denied, saying that the claim of the Commission that "it had the right to investigate any question having to do with the business of any corporation, except banks and common carriers subject to the control of the Interstate Commerce Commission," was unfounded. In Federal Trade Commission *v.* Baltimore Grain Products Company[1] the Commission asked for a writ of mandamus under Section 9 of the Act to compel certain corporations to permit an examination by the Commission of the books and documents relating to the respondent's business in interstate commerce. The Commission's authority in this case was even widened by a Senate resolution charging the Commission with the duty of investigating the "relation between prices at the farm and export prices."[2] The court said the question in the case was whether the statute confers upon the Commission the right to inspect and copy the papers of any private corporation engaged in interstate and foreign commerce, whenever in the judgment of the Commission such inspection may furnish information of value to an inquiry it is making as to some economic or commercial problem, and when it has no reason to believe that any violation of law has been committed. The court said it was satisfied that this is beyond any power which Congress can confer, in this way, at least. The court construed the act to authorize such an investigation only where some conduct of the particular corporation was the object of the inquiry. In the case of the American Tobacco Company *v.* The Federal Trade Commission,[3] the Court held that the Trade Commission Act,

[1] Federal Trade Commission *v.* Baltimore Grain Products Company, 284 Fed. 886 (1922).

[2] 62 *Cong. Record* 687, December 22, 1921.

[3] American Tobacco Company *v.* Federal Trade Commission, 264 U. S. 298 (1924); see also Wilson *v.* U. S., 221 U. S. 361; Silverthorne Lumber Co. *v.* U. S., 251 U. S. 385; Boyd *v.* U. S., 116 U. S. 616.

construed in the light of the "unreasonable searches and seizures" clause, did not authorize the Commission to allow a search through all the respondent's records, relevant and irrelevant, in the hope that something might turn up. The Supreme Court said in this case that the extent of the authority granted by Congress to the Commission did not include this power.

A summary view of these decisions shows at least the inclination of the courts to hold such a commission strictly to the terms of the act defining its authority, that it is, as we have noted, an agency of limited purpose. The whole power of investigation of Congress does not descend upon these commissions by virtue of an act charging them, for example, with the duty of investigating facts significant to interstate commerce. The facts which a commission of this sort may compel apparently, must relate to the determination of legal rights and duties under existing law.[1] Of course most of the work of the Interstate Commerce Commission and Federal Trade Commission comes under this head, yet there are signs of the need for these commissions to undertake fact-finding investigations of general economic and social significance,[2] which may not have reference to existing law and may not even be immediately necessary for the enactment of legislation. As far as the courts are concerned, it seems to be an open question whether these commissions can compel testimony when engaged solely in a search for facts which are not to be used in the enforcement of existing law.[3] If such a procedure is not due process, Congress is certainly

[1] Harriman *v.* Interstate Commerce Commission, *supra*, p. 413.

[2] Proof of this is seen in the character of the subject matter of the investigations of the Federal Trade Commission in which attempts to compel testimony have been defeated by the courts.

[3] See *supra*, p. 414.

crippled in its power to collect facts which may be of great importance to the public understanding of significant economic and social problems.[1] The increasing complexity of our economic system with its rapid development of new and powerful industries such as water power and related public utilities, demands as wide a collection of facts as possible as a means to some effective measure of social control.

In one sense Congress has been using the power to compel testimony in fact-finding investigations ever since the early part of the nineteenth century by means of its investigating committees, and the Supreme Court of the United States has recently declared in McGrain v. Daugherty [2] that the compulsory investigation of facts which are necessary in order to legislate wisely is a power properly belonging to the Houses of Congress. These investigations should be called "fishing expeditions" by the courts only if the inconvenience suffered by the individual in giving such testimony is greater than the advantage to the state of having such information.

Of course the attitude that no government commission should be allowed to compel evidence unless it relates to the particular conduct of the particular individual or corporation being investigated, or unless the investigation relates to the enforcement of the law, really goes back to the fundamental conception of what constitutes due process. There is no doubt that a person compelled to testify or produce papers, is thereby deprived of his liberty and property, and that this inconvenience to the individual must be offset by some great advantage to the public or the government. It has always been understood that such compulsion was due process if it provided for the production of the testimony before a court, as here usually rights and duties were in dispute and the

[1] See David Lilienthal, *op. cit.*, p. 721.

[2] McGrain *v.* Daugherty, 273 U. S. 135 (1927).

advantage to the state of being able to render a just decision was considered of more importance than the inconvenience of the individual. Since Interstate Commerce Commission *v.* Brimson,[1] it has also been the rule that government administrative agencies may compel testimony in the course of proceedings for the determination of legal rights and duties under existing law by invoking the aid of the courts in enforcing such testimony. The question is, will the courts take the next step and declare that the compulsion of testimony in investigations solely for fact-finding, is due process? Congress has already declared the need for such investigations in its grant of power to the Federal Trade Commission.[2]

[1] See *supra*, p. 399.

[2] Note broad powers of investigation given to the Federal Trade Commission, *supra* at p. 419. Also see debate in Senate, February 14, 1928 on the George amendment to the Walsh resolution (S. Res. 83) proposing to refer the subject of the inquiry of the Senate into the public utilities industries of the United States to the Federal Trade Commission. *The United States Daily*, February 15, 1928.

APPENDIX A

New York State Legislative Law

Art. 2, sec. 2.—*Exemption of members and officers from arrest.* A member of the legislature shall be privileged from arrest in a civil action or proceeding other than for a forfeiture or breach of trust in public office or employment, while attending upon its session, and fourteen days before and after, each session, or while absent, for not more than fourteen days during the session with the leave of the house of which he is a member.

An officer of either house shall be privileged from arrest in such a civil action or proceeding while in actual attendance upon the house. Either house shall have the power to discharge from arrest any of its members or officers arrested in violation of his privilege from arrest.

History: Formerly Legislative Law of 1892, sec. 2
Rev. from *R. S.* pt. 1, ch. 7, tit. 2, sec. 6-8 (1 R. S. 154, sec. 6-8)
Amplified in 1 *Edmonds' Rev. Stat.* [154]
5 *Edmonds' Rev. Stat.*, 259-60
Rev. from 1 *Rev. Laws*, 122 (*Laws of 1788*, ch. 34)

General provision as to privilege from arrest; discharge of privileged person. Civil Practice Act, sec. 851. This act does not abridge or affect a privilege from arrest given by law or a right of action for a breach thereof. A privileged person is entitled to be discharged from arrest where other provision is not made therefor by law, by the court or a judge thereof, or by

the county judge of a county where the arrest was made. The order must be made upon proof of the facts entitling the applicant to the discharge; and the arrest and discharge are not a bar to a new arrest after the privilege has ceased. The court or judge may make the order without notice, or may require notice to be given to the sheriff or to the plaintiff, or to both.

History: Rev. from *Code Civ. Pro.*, sec. 564
Amd. *Laws 1877*, ch. 416
Amd. *Laws 1895*, ch. 946

Art. 2, sec. 3. *Expulsion of members.* Each house has the power to expel any of its members, after the report of a committee to inquire into the charges against him shall have been made.

History: Formerly the *Legislative Law of 1892*, sec. 3
Rev. from *R. S.*, pt. 1, ch. 7, tit. 2, sec. 12

Members of the legislature liable to forfeiture of office. Penal Law, sec. 1331. The conviction of a member of the legislature of either of the crimes defined in this article, involves as a consequence in addition to the punishment prescribed by this chapter, a forfeiture of his office; and disqualifies from ever afterwards holding any office under this state.

History: Formerly the *Penal Code*, sec. 70
Rev. from *R. S.*, pt. 4, ch. 1, tit. 4, sec. 10 (2 *R. S.*, 682, sec. 10)
Amd. *Laws 1855*, ch. 537, sec. 1

Art. 2, sec. 4. *Contempts of either house.* Each house may punish by imprisonment not extending beyond the same session of the legislature, as for a contempt, for the following offenses only:

1. Arresting a member or officer of either house in violation of his privilege from arrest;

2. Disorderly conduct of its members, officers or others in the immediate view and presence of the house, tending to interrupt its proceedings;

3. The publication of a false and malicious report of its pro-

ceedings, or of the conduct of a member in his legislative capacity;

4. Giving or offering a bribe to a member, or attempting, by menace or other corrupt means, directly or indirectly, to influence a member in giving or withholding his vote, or in not attending meetings of the house of which he is a member;

5. Neglect to attend or to be examined as a witness before the house or committee thereof, or upon reasonable notice to produce any material books, papers, or documents, when duly required to give testimony or to produce such books, papers or documents in a legislative proceeding, inquiry or investigation.

History: Formerly the *Legislative Law of 1892,* sec. 4
Amd. *Laws of 1905,* ch. 23, sec. 1
Rev. from *R. S.*, pt. 1, ch. 7, tit. 2, sec. 13, 14 (1 *R. S.* 154-5)

Bribery of members of the legislature. Penal Law, sec. 1327. A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement thereof, to a member of the legislature, or attempts, directly or indirectly, by menace, deceit, suppression of truth, or other corrupt means, to influence a member to give or withhold his vote, or to absent himself from the house of which he is a member, or from any committee thereof, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

History: Formerly *Penal Code, sec. 66*
Rev. from *R. S.*, pt. 4, ch. 1, tit. 4, sec. 9 (2 *R. S.* 682, sec. 9)
Amd. *Laws 1853,* ch. 539, sec. 1

Receiving bribes by members of legislature. Penal Law, sec. 1328. A member of either of the houses composing the legislature of this state, who asks, receives, or agrees to receive any bribe upon any understanding that his official vote, opinion judgment or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter upon which he may be required to act

in his official capacity, or who gives or offers or promises to give any official vote in consideration that another member of the legislature shall give any such vote, either upon the same or another question, is punishable by imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or both.

History: Formerly *Penal Code,* sec. 67
Rev. from *R. S.* pt. 4, ch. 1, tit. 4, sec. 10 (2 *R. S.* 682-3, sec. 10)
Amd. *Laws 1853,* ch. 539, sec. 1

Witness refusing to attend before the legislature or legislative committees. Penal Law, sec. 1329. A person who, being duly summoned to attend as a witness before either house of the legislature or any committee thereof, authorized to summon witnesses, refuses or neglects without lawful excuses to attend pursuant to such summons, is guilty of a misdemeanor.

History: Formerly *Penal Code,* sec. 68
Rev. from *R. S.,* pt. 4, ch. 1, tit. 4, sec. 14a. (2 *R. S.* 683, sec. 14a)
Amd. *Laws 1853,* ch. 539, sec. 2.

Refusing to testify. Penal Law, sec. 1330. A person who, being present before either house of the legislature or any committee thereof authorized to summon witnesses, wilfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor.

History: Formerly *Penal Code,* sec. 69
Rev. from *R. S.,* pt. 4, ch. 1, tit. 4, sec. 15a (2 *R. S.,* 683, sec. 15a)
Added by *Laws 1853,* ch. 539, sec. 2

Art. 2, sec. 9. *Additional employees.* A committee of investigation or other special committee of the legislature or of either house thereof may employ needed assistants.

History: Formerly the *Legislative Law of 1892,* sec. 9
Amd. *Laws 1915,* ch. 483, sec. 3

Art. 4, sec. 60. *Testimony before legislative committees.* A legislative committee may require the attendance of witnesses in this state whom the committee may wish to examine, or may issue a commission for the examination of witnesses who are out of the state or unable to attend the committee or excused from attendance, which commission if directed by the house or legislature by which the committee is appointed may be executed during the recess of the legislature. A commission issued as provided by this section shall be in the form used in the courts of record of this state and shall be executed in like manner. Unless otherwise instructed by the committee appointing them the commissioners shall examine privately every witness attending before them and shall not make public the particulars of such examination.

History: Formerly the *Legislative Law 1892,* sec. 60
Rev. from *R. S.*, pt. 1, ch. 7, tit. 5, sec. 1-11 (1 *R. S.*, 158)
Sec. 1, rev. from *Laws 1814,* ch. 13, p. 24.

Service of subpoena issued out of court. Civil Practice Act, sec. 404. A subpoena issued out of the court, to compel the attendance of a witness, and, where the subpoena so requires, to compel him to bring with him a book or paper, must be served as follows:

1. The original subpoena must be exhibited to the witness.
2. A copy of the subpoena, or a ticket containing its substance, must be delivered to him.
3. The fees allowed by law for travelling to and returning from the place where he is required to attend, and for one day's attendance, must be paid or tendered to him.

History: Formerly *C. C. P.*, sec. 852
Rev. from *R. S.*, pt. 3, ch. 7, tit. 3, sec. 42 (2 *R. S.* 400, sec. 42)
Rev. from 1 *R. L.*, p. 524, sec. 20 (*Laws 1813,* ch. 56, sec. 20)
See also: 1 *K. & R.*, 356, sec. 20

Penalty for disobedience to subpoena or order. Civil Practice

Act, sec. 405. A person so subpoenaed, who fails without reasonable excuse to obey the subpoena, or a person who fails without reasonable excuse to obey an order, duly served upon him, made by the court or a judge in an action, before or after final judgment therein, requiring him to attend and be examined, or so to attend and bring with him a book or paper, is liable, in addition to punishment for contempt, for the damages sustained by the party aggrieved in consequence of the failure, and fifty dollars in addition thereto. Those sums may be recovered in one action or in separate actions. If he is a party to the action in which he was subpoenaed, the court, as an additional punishment, may strike out his pleading.

History: Formerly *C. C. P.*, sec. 853
Rev. from *R. S.*, pt. 3, ch. 7, tit. 3, sec. 43 (2 *R. S.* 400-1, sec. 43)
Rev. from 1 *R. L.*, p. 524, sec. 20 (*Laws 1813*, ch. 56, sec. 20)
See also: 1 *K. & R.*, 356, sec. 20

Witness refusing to attend before the legislature or legislative committees.

See *supra*: Art. 2, sec. 4. *Penal Law*, sec. 1329

Refusing to testify.

See *supra*: Art. 2, sec. 4. *Penal Law*, sec. 1330

Witness' right to counsel.—"A witness summoned before a legislative committee has no constitutional or legal right to be attended by, or to the aid of, counsel on his examination." People, ex rel. McDonald v. Keeler (1885) 99 N. Y., 463.

Art. 4, sec. 61. *Subcommittees.* Whenever any standing committee of either house of the legislature shall be required to make an inquiry or investigation, such committee may appoint a subcommittee of not less than three of its own members to make such inquiry or investigation, and to take testimony in relation thereto; and such committee or subcommittee and the chairman thereof shall respectively have all the powers and authority, which are conferred by law upon any committee which

is authorized to send for persons or papers, or upon the chairman thereof.

History: Formerly *Legislative Law 1892*, sec. 61.
Rev. from *Laws 1886*, ch. 653, sec. 11, in part.

Art. 4, sec. 62. *Witnesses' fees.* Any person attending as a witness under the provisions of the last two sections shall receive the same fees as are allowed witnesses in civil actions in courts of record. Such fees need not be prepaid, but the comptroller upon the certificate of the chairman of the committee, and the proof by affidavit or otherwise that the same is due, shall draw his warrant for the payment of the amount thereof.

History: Formerly *Legislative Law 1892*, sec. 62.
Rev. from *R. S.*, pt. 1, ch. 7, tit. 5, sec. 11 (1 *R. S.*, 156, sec. 11)
Amd. *Laws 1886*, ch. 653, sec. 11, in part.

Fees of witnesses generally. Civil Practice Act, sec. 1539. A witness in an action or a special proceeding attending before a court of record or a judge thereof is entitled, except where another fee is specially prescribed by law, to fifty cents for each day's attendance; and, if he resides more than three miles from the place of attendance, to eight cents for each mile to the place of attendance.

History: Formerly *C. C. P.*, sec. 3318
Rev. from *R. S.*, pt. 3, ch. 10, tit. 3, sec. 33 (2 *R. S.*, 642, sec. 33)
Amd. *Laws 1840*, ch. 386, sec. 8

Art. 4, sec. 62-a. *Subpoenas; oaths.* The chairman, vice-chairman or a majority of a legislative committee may issue a subpoena requiring a person to attend before the committee and be examined in reference to any matter within the scope of the inquiry or investigation being conducted by the committee, and, in a proper case, to bring with him, a book or paper. The provisions of the civil practice act in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee or other person in a matter not arising in an action in a

court of record apply to a subpoena issued by a legislative committee as authorized by this section. Any member of a legislative committee may administer an oath to a witness.

[Such provisions enforcing obedience are Civil Practice Act, sec. 405, 406, 407, 408]

History: This section was transferred by *Laws of 1920*, ch. 936, from the *Code Civ. Pro.* Sec. 854, as to legislative committees:

C. C. P., sec. 854
Amd. *Laws 1877*, ch. 416
Amd. *Laws 1900*, ch. 587
Rev. from *R. S.*, pt. 3, ch. 7, tit. 3, sec. 44 (2 *R. S.*, 401 sec. 44) and *Code Civ. Pro.*, sec. 843, as to oaths:
C. C. P., sec. 843
Amd. *Laws 1877*, ch. 416
Amd. *Laws 1843*, ch. 57
Rev. from *R. S.*, pt. 3, ch. 8, tit. 17, sec. 11 (2 *R. S.*, 552, sec. 11)

Art. 4, sec. 63. *Expenses of committees.* Whenever by resolution of either house, a committee duly appointed by it, shall be directed to conduct an investigation or take testimony in any other place than the city of Albany, the comptroller shall draw his warrant for the payment of the actual and necessary expenses of the committee or subcommittee having in charge such investigation, inquiry or taking of testimony, and of the officers and employees authorized to accompany them, upon the rendition of an itemized bill of such expenses certified by the chairman of the committee, and approved by the presiding officer of the house by which the committee was appointed, and upon proof by affidavit or otherwise that the same is due.

History: Formerly the *Legislative Law of 1892*, sec. 63
Rev. from *Laws 1886*, ch. 653, sec. 11, in part

APPENDIX B

Congressional Statutes and their Derivation

U. S. Code. Title 2. The Congress, Congressional investigations, secs. 191-195-1. Title 2: 191. *Oaths to witnesses.* The President of the Senate, the Speaker of the House of Representatives, or a chairman of a committee of the Whole, or of any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination. Any member of either House of Congress may administer oaths to witnesses in any manner depending in either House of Congress of which he is a member, or any committee thereof.

History: Rev. from *U. S. R. S.,* sec. 101
Rev. from 1 *Stat.,* 554; 3 May 1798
Amd. 3 *Stat.,* 345; 8 Feb. 1817, ch. 10
Amd. 23 *Stat.,* 60; 26 June, 1884, ch. 123
In Gould & Tucker. *Notes on the Revised Statutes,* v. 1, p. 11: For sec. 101—"The provision in the original acts for punishing perjury are here omitted, as merged in the general provision covering all perjuries, under Title 'Crimes'." 1 Com. D. 66. (Commissioners' Draft)

For additional provisions pertaining to Senate procedure in administering oaths, *See Senate Manual,* p. 116, 117. *Senate Doc. no. 168,* 68th Cong. 2d sess.

Cases: 235 *U. S.,* 219: Henry *v.* Henkel
273 *U. S.,* 135: McGrain *v.* Daugherty

Title 2: 192. *Refusal of witnesses to testify.* Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or

any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months.

History: Same as *Rev. Stat. sec. 102*
Rev. from 11 *Stat.*, 155; 24 Jan. 1857, ch. 19, sec. 1
Amd. 12 *Stat.*, 333; 24 Jan. 1862, ch. 11

Cases: 6 Wheaton 204: Anderson *v.* Dunn
103 *U. S.*, 168: Kilbourn *v.* Thompson
156 *U. S.*, 211: *In re* Chapman
164 *U. S.*, 436: Chapman *v.* U. S.
166 *U. S.*, 661: *In re* Chapman
52 *Wash. L. Rep.* 451: Sinclair *v.* U. S.
235 *U. S.*, 219: Henry *v.* Henkel
243 *U. S.*, 521: Marshall *v.* Gordon
273 *U. S.*, 135: McGrain *v.* Daugherty
207 *Fed.*, 805: Henry *v.* Henkel
299 *Fed.*, 620: *Ex Parte* Daugherty
3 *Fed.*, 2d. 488: Railroad Labor Board *v.* Robertson
99 *N. Y.*, 479: People ex rel McDonald *v.* Keeler
1 *McArthur*, 453: Stewart *v.* Blaine
14 *Ct. Claims* (*U. S.*), 539: Lilley *v.* U. S.
U. S. Daily, March 18, 1927. Sinclair's Case

Title 2: 193. *Privilege of witnesses.* No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

History: Same as *Rev. Stat.*, sec. 103
Rev. from 11 *Stat.*, 155, sec. 2; 24 Jan. 1857, ch. 29, sec. 2
Amd. 12 *Stat.*, 333; 24 Jan. 1862, ch. 11

Cases: 156 *U. S.*, 211: *In re* Chapman
166 *U. S.*, 661: *In re* Chapman
227 *U. S.*, 131: Heike *v.* U. S.
235 *U. S.*, 219: Henry *v.* Henkel
273 *U. S.*, 135: McGrain *v.* Daugherty
3 *Fed.*, 2d. 488: Railroad Labor Board *v.* Robertson

Title 2: 194. *Witnesses failing to testify.* Whenever a witness summoned as mentioned in sec. 192 of this article fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

History: Rev. from *Rev. Stat.*, sec. 104
Rev. from 11 *Stat.*, 156, sec. 3; 24 Jan. 1857, ch. 19, sec. 3

Cases: 156 *U. S.*, 211: *In re* Chapman
166 *U. S.*, 661: *In re* Chapman
235 *U. S.*, 219: Henry *v.* Henkel
273 *U. S.*, 135: McGrain *v.* Daugherty
3 *Fed.*, 2d. 488: Railroad Labor Board *v.* Robertson

Title 2: 195. *Fees of witnesses in District of Columbia.* Witnesses residing in the District of Columbia and not in the service of the government of said District or of the United States, who shall be summoned to give testimony before any committee of the House of Representatives, shall not be allowed exceeding $2.00 for each day's attendance before said committee.

History: 19 *Stat.*, 41; May 31, 1876, ch. 88

Title 2: 195-1. *Limit on cost of Senate inquiries and investigations.* Hereafter Senate resolutions providing for inquiries and investigations shall contain a limit of cost of such investigation, which limit shall not be exceeded except by vote of the Senate authorizing additional amounts.

History: 44 *Stat.* [162]. App. p. 1877; 3 March 1926, ch. 44, sec. 1

Senate Resolution: *Fees of witnesses,* U. S. Senate. Jan. 4, 1900.

Resolved: That the rule for paying witnesses summoned to appear before the Senate or any of its committees shall be as follows: For each day a witness shall attend, three dollars, and three dollars for each day spent in travelling to or from the place of examination by the usual route. A witness shall also be entitled to be reimbursed his necessary expenses for travelling to and from the place of examination in no case to exceed the sum of 7 cents a mile for the distance by him actually travelled for the purpose of appearing as a witness.

(This is a standing order of the Senate—*Senate Manual, Sen. Doc. no. 182,* 68th Cong., 2d. sess.)

Title 28: 634. *Judicial code and judiciary. Testimony of witnesses before Congress*: No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

History: Same as *Rev. Stat. sec. 859*
Rev. from 11 *Stat.,* 156; 24 Jan. 1857, ch. 19
Amd. 12 *Stat.,* 333; 24 Jan. 1862, ch. 11

Cases: 166 *U. S.,* 661: *In re* Chapman
227 *U. S.,* 131: Heike *v.* U. S.
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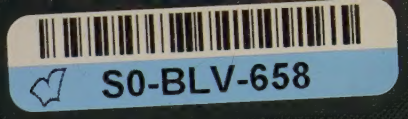
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